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91-246

No. 91-___

In The

Supreme Court of the United States

October Term, 1991

SAMUELS, KRAMER & COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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August 7, 1991

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QUESTION PRESENTED

Does Tax Court Rules of Practice & Procedure 183(c), under which the findings of fact of a special trial judge must be "presumed to be correct" by the Tax Court, violate 26 U.S.C. § 7443A(c) and this Court's decision in *Freytag v. Commissioner of Internal Revenue*, 59 U.S.L.W. 4872 (1991), which preclude a special trial judge from making the decision of the Tax Court?

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The opinion for the United States Court of Appeals for the Second Circuit is reported at 930 F.2d 975 (1991) and reprinted as Appendix A. The opinion of the United States Tax Court is reported at 94 T.C. 549 (1990) and reprinted as Appendix B.

JURISDICTION

The decision of the Court of Appeals was entered on April 2, 1991. A timely petition for rehearing was denied on May 14, 1991. *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The text of 26 U.S.C. § 7443A is set forth in Appendix D. The text of Tax Court Rules of Practice & Procedure 183 is in Appendix E.

STATEMENT OF THE CASE

In the closely related case of *Freytag v. Commissioner of Internal Revenue*, ___ U.S. ___, ___ S.Ct. ___, 59 U.S.L.W. 4872 (1991), issued on June 27, 1991, this Court held that the Tax Court's assignment of a complex tax deficiency case such as this one is permissible under 26 U.S.C. § 7443A(b)(4) and the Appointments Clause of the United States Constitution, Art. II, § 2, cl.2. The Court, however, expressly declined to reach the question presented by this

petition: whether a special trial judge's conduct of proceedings under the highly deferential standard mandated by Tax Court Rules of Practice & Procedure 183(c) violates the authorizing statute, 26 U.S.C. § 7443A(c), which precludes a special trial judge from making the decision in a case assigned pursuant to § 7443A(b)(4). Rule 183(c) requires that the Tax Court give "due regard" to the credibility determinations of a special trial judge and presume his factual findings to be correct. This issue was fully briefed and argued by petitioners in *Freytag*, and, in fact, well over half of the oral argument on both sides was devoted to the question of the nature of review required by Rule 183, *see generally*, Official Transcript Proceedings Before the Supreme Court of the United States, *Freytag v. Commissioner of Internal Revenue*, No. 90-762, but this Court declined to address the question at that time on the ground that the issue was not within the bounds of the questions presented in that case. 59 U.S.L.W. at 4874 n. 3.

Proceedings Below

Petitioner Samuels, Kramer & Company[1] filed a petition in the United States Tax Court for a redetermination of alleged tax deficiencies totalling over 1.4 million dollars. On August 30, 1989, the Chief Judge of the Tax Court assigned this case and several others raising similar tax issues to Special Trial Judge Carlton Powell "for trial or

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[1] Petitioner Samuels, Kramer & Company has no parent company nor any subsidiaries.

other disposition" pursuant to Tax Court Rules of Practice & Procedure 180, 181, and 183.[2] *See* Order of the United States Tax Court (reprinted as Appendix F). Petitioner Samuels, Kramer & Company and several other taxpayers immediately filed a Motion to Vacate Assignment of Special Trial Judge, arguing that the assignment violated 26 U.S.C. § 7443A and that the appointment of the special trial judge by the Chief Judge violated the Appointments Clause.

On April 9, 1990, the Tax Court denied the motions to vacate in an opinion reviewed by the full Tax Court pursuant to 26 U.S.C. § 7460(b) (with two judges not participating), and certified its decision for interlocutory appeal pursuant to the provisions of 26 U.S.C. § 7482(a)(2). *First Western Government Securities, Inc., et al. v. Commissioner of Internal Revenue*, 94 T.C. 549 (1990) (A43).[3] Samuels, Kramer & Company petitioned the United States Court of Appeals for the Second Circuit for interlocutory review of the Tax Court's decision and on May 16, 1990, the Second Circuit granted the petition. *See Samuels, Kramer & Co. v. Commissioner of Internal Revenue*, 930 F.2d 975, 979 (2d Cir. 1991) (A5). On April 2, 1991,

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[2] This case arises from the same general transactions as those underlying *Freytag*, and is one of about three thousand cases, including those consolidated for trial in *Freytag*, that are pending in the Tax Court and present the same or similar tax issues.

[3] The Tax Court concluded that the statute authorized the assignment and that the appointment of the special trial judge by the Chief Judge did not violate the Appointments Clause because the Tax Court is a "Court of Law" for purposes of the Appointments Clause.

while *Freytag* was pending in this Court, the Second Circuit affirmed the Tax Court.

The Second Circuit concluded that the phrase "any other proceeding" in 26 U.S.C. § 7443A(b)(4) permitted assignment of this case to a special trial judge, rejecting Samuels, Kramer & Company's argument that the phrase must be limited by the nature of the proceedings assignable under § 7443A(b)(1) through (3). 930 F.2d at 980-81 (A10). The Second Circuit concluded that Congress intended to "differentiate subsection (b)(4) cases, in which the ultimate decisional authority remains with the Tax Court, from those cases [assignable under (b)(1) through (3)] in which a special trial judge may make the final decision." *Id.* at 981 (A10). The Second Circuit noted that when Congress amended § 7443A to add subsection (b)(4), it "precluded special trial judges from entering the final decision in any case assigned pursuant to this provision." *Id.* at 982 (A12-13).[4]

However, in its opinion the Second Circuit rejected without discussion petitioner's argument that Rule 183 effectively permits a special trial judge to decide cases assigned under (b)(4) in violation of the statutory

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[4] With respect to petitioner's constitutional argument, the Second Circuit affirmed the Tax Court on different grounds. Although the Second Circuit agreed that a special trial judge is an "inferior officer" and not a mere employee, the Second Circuit disagreed with the Tax Court's conclusion that the Tax Court is a "Court of Law" for purposes of the Appointments Clause. 930 F.2d at 984-90 (A30). Instead, the Second Circuit upheld the appointment on the grounds that the Tax Court is an executive "Department" within the meaning of the Appointments Clause. *Id.* at 990-94 (A31-38).

scheme.[5] Petitioner filed a petition for rehearing, arguing that the Second Circuit erred in failing to consider the effect of Rule 183. Petition for Rehearing at 4.[6] Petitioner again argued that Rule 183, which *requires* that the findings of a special trial judge be presumed to be correct by the Tax Court, permits a special trial judge to make the decisions of the Tax Court despite the provision of § 7443A(c). *See generally* Petition for Rehearing at 4-5. Rule 183, applicable to all cases in which the amount in controversy exceeds $10,000, mandates that the Tax Court review the decisions of special trial judges at most under a clearly erroneous standard, *see Stone v. Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989), and it certainly precludes *de novo* review. This highly deferential standard of review means that special trial judges are effectively deciding cases assigned pursuant to (b)(4) contrary to the requirements of § 7443A(c), and indeed, that Tax Court judges are precluded from deciding (b)(4) cases *de novo*. Thus, petitioner argued, the distinction upon which the Second Circuit relied to uphold assignment of this case to a special trial judge is in fact a distinction without a difference.

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[5] Petitioner made this argument in its Opening Brief in the Second Circuit. *See* Brief for Petitioners at 14-15.

[6] Petitioner also argued that the Second Circuit erred in concluding that the Tax Court is an executive "Department" within the meaning of the Appointments Clause. Petition for Rehearing at 5-8. While the Second Circuit's decision on this issue is contrary to this court's resolution of the question in *Freytag*, this petition does not present any question under the Appointments Clause.

On May 14, 1991, the Second Circuit denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

This Court has made clear that special trial judges cannot decide cases assigned to them pursuant to 26 U.S.C. § 7443A(b)(4). *Freytag*, 59 U.S.L.W. at 4874 n. 3. But the highly deferential standard of review required by Rule 183 effectively permits special trial judges to decide a vast number of cases assigned to them pursuant to § 7443A(b)(4) despite explicit statutory language and congressional intent that special trial judges not decide such cases. As of February 1990 there were 54,428 cases pending in the Tax Court. Special trial judges had been assigned approximately 14,500 of these cases pursuant to 26 U.S.C. § 7443A(b)(4) and Rule 183. *See First Western Government Securities*, 94 T.C. at ___ (A47). Thus, the deference mandated by Rule 183 permits the Tax Court to shift *over 26% of its docket* to special trial judges for decision in violation of § 7443A(c).

The standard of review the Tax Court must apply to the findings of a special trial judge in a (b)(4) case has enormous practical significance for taxpayers contesting deficiencies and for the operation of the Tax Court. Both this Court and the Second Circuit concluded that § 7443A(b)(4) authorizes assignment of a complicated tax case such as this one to a special trial judge because, unlike the other cases assignable to special trial judges under § 7443A(b), special trial judges cannot decide (b)(4) cases. *See Freytag*, 59 U.S.L.W. at 4874 & n. 3. However,

the distinction between (b)(4) cases and the other cases assignable to special trial judges becomes ephemeral in light of the deference the Tax Court must accord the findings of special trial judges under Rule 183. In short, by adopting a deferential standard of review for (b)(4) cases that at best requires "clearly erroneous" review, the Tax Court has defeated the clear congressional intent to limit the decisional authority of special trial judges and this Court's clear statement that (b)(4) cases must be decided by the regular Tax Court judges.

Moreover, the Courts of Appeals that have confronted the standard of review required by Rule 183 have reached contrary results. The District of Columbia Circuit has directly addressed the question, holding that "clearly erroneous" review is required, see *Stone v. Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), and indeed reversed the Tax Court for reversing its own special trial judge in a (b)(4) case.[7] The Fifth Circuit in *Freytag* suggested that at the very least the Tax Court must review the findings of a special trial judge *de novo*. *See Freytag v. Commissioner*, 904 F.2d 1011, 1015 (5th Cir. 1989) (Tax Court had both the power and the obligation to maintain full responsibility for the decision); *id.* at n. 8 (Tax Court's relation to its special trial judges cannot be analogized to typical appellate review). The court below in this case disagreed *sub silentio* with the *Stone* court but did not determine what standard of review is required.

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[7] Justice Scalia, in colloquy with Deputy Solicitor General John Roberts at oral argument in *Freytag*, stated that given the language of Rule 183, "I'd reverse them, too." Official Transcript Proceedings Before the Supreme Court of the United States, *supra*, at 39.

Finally, the government echoed the confusion of the Circuit Courts at oral argument in *Freytag*. In oral argument to this Court, counsel for the government, Deputy Solicitor General John Roberts, conceded that if the standard of review required by Rule 183 is a "clearly erroneous" standard, such review violates § 7443A(c). The Deputy Solicitor General engaged in the following colloquy with Justice O'Connor regarding Tax Court Rule 183(c):

> QUESTION: Well, Mr. Roberts, to get back to my question, which you never did answer, suppose it does mean it's reviewed under a clearly erroneous standard. Would that violate the authorizing statute in your view?
>
> MR. ROBERTS: I think it might well, Your Honor.
>
> . . . .
>
> In the sense that a clearly erroneous standard is closer -- the statute requires that the regular tax court judge in this category of cases make the decision.
>
> . . . .
>
> And I think under a clearly erroneous standard that may be abdicating too much of his statutory responsibility.

Official Transcript Proceedings Before the Supreme Court of the United States, *supra*, at 40 (attached hereto as Appendix G). The Deputy Solicitor General simply asserted that, despite the plain language of Rule 183, the Rule somehow permits more searching scrutiny by a regular Tax Court Judge.

This Court should grant certiorari now to finally resolve this important question.

I. BY REQUIRING SPECIAL TRIAL JUDGE FINDINGS TO BE PRESUMED CORRECT BY THE TAX COURT, RULE 183 VIOLATES § 7443A(c) BECAUSE IT PERMITS SPECIAL TRIAL JUDGES TO DECIDE CASES ASSIGNED UNDER § 7443A(b)(4)

The Second Circuit concluded that this complex tax case could be assigned to a special trial judge for disposition pursuant to 26 U.S.C. § 7443A(b)(4)[8] and Rule 183. While acknowledging that § 7443A(c) clearly provides that special trial judges cannot make the decision of the Tax Court in cases such as this case, the Second Circuit rejected petitioner's argument that the standard of review required by Rule 183 will effectively permit a special trial judge to decide this case. The Second Circuit erred.

A. Rule 183 Precludes De Novo Review And At Most Permits A Clearly Erroneous Standard Of Review

Rule 183, applicable to (b)(4) cases, provides for an extremely deferential standard of review for the report of a special trial judge: "due regard *shall* be" given to the fact that the special trial judge had the opportunity to

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[8] Section 7443A(b)(1) through (3) permit special trial judges to hear certain limited and relatively simple cases, while § 7443A(b)(4) permits a special trial judge to hear "any other proceeding" the chief judge may designate. However, a special trial judge can decide only those cases assigned pursuant to § 7443A(b)(1) through (3). *See* 26 U.S.C. § 7443A(c).

evaluate the credibility of witnesses, and "the findings of fact recommended by the Special Trial Judge *shall be presumed to be correct.*" (A77) (emphasis added). This provision violates § 7443A(c) because it effectively permits special trial judges to decide cases assigned pursuant to § 7443A(b)(4). By requiring that the Tax Court defer to the credibility determinations of the special trial judge and presume his factual findings to be correct, Rule 183 prohibits the Tax Court from reviewing or evaluating the evidence independently and reaching its own factual and legal conclusions based upon that evidence. In fact, in oral argument in *Freytag*, Deputy Solicitor General Roberts stated as much:

> QUESTION: At a minimum, Mr. Roberts, "shall be presumed to be correct" means that if everything else is in equipoise, what the – what the special trial judge found prevails. Doesn't it mean that at a minimum?
>
> MR. ROBERTS: If it's – if it's a straight tie, then that's what it – that's what it means. Yes.

Official Transcript Proceedings Before the Supreme Court of the United States, *supra*, at 35.

Certainly, the presumption of correctness in Rule 183 flatly precludes *de novo* review by the Tax Court of the findings of fact of a special trial judge. In fact, the only court to directly address this issue has concluded that under Rule 183 the Tax Court must review the findings of fact of a special trial judge under a "clearly erroneous" standard of review. *Stone v. Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989) (reversing the Tax Court's reversal

of a special trial judge).[9] In *Stone* the D.C. Circuit held that Rule 183 "sought to establish the relatively high level of deference that the phrase 'clearly erroneous' entails." *Id.* at 344. Under this standard, the findings of a special trial judge can be reversed only if there is a "strong affirmative showing" of error. *Id.* at 345 (quoting *Hebah v. United States*, 197 Ct. Cl. 729, 456 F.2d 696, *cert. denied*, 409 U.S. 870 (1972)). A simple preponderance of the evidence, although sufficient to meet the taxpayer's burden of proof in the first instance, will not suffice to overturn the factual findings of a special trial judge. *Id.* at 347.

A "clearly erroneous" standard of review contravenes the explicit statutory language and congressional intent that the regular Tax Court judges actually decide (b)(4) cases, for it deprives those judges of any discretion to review or consider the evidence presented or to reach their own conclusions on that evidence in close cases, and precludes those judges from independently assessing the credibility of witnesses unless "the objective evidence . . . materially contradict[s]" the credibility determination made by the special trial judge in the first instance. *See, Stone*, 865 F.2d at 351. These functions – evaluating evidence, including the credibility of witnesses, and reaching legal conclusions based on that evidence – are at

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[9] As discussed *supra*, at p. 7, the Courts of Appeals have split on the issue of the level of review required by Rule 183 and § 7443A(c). The Fifth Circuit suggested that whatever the requirement of Rule 183, the *statute* requires that the findings and conclusions of a special trial judge be reviewed by the Tax Court at least *de novo*. *Freytag*, 904 F.2d at 1015 & n. 8.

the core of judicial decision making. Since Congress has expressly chosen the regular Tax Court judges to be the decision makers in (b)(4) cases, those judges must perform these functions in some meaningful way. Reviewing the findings and conclusions of a special trial judge for clear error and giving "due regard" to the special trial judge's credibility determinations plainly does not satisfy the Tax Court judges' statutory obligation to make the decision of the Tax Court in (b)(4) cases. *See* Official Transcript Proceedings Before the Supreme Court of the United States, *supra*, at 40 (counsel for the government conceding that clearly erroneous review might abdicate Tax Court's statutory responsibility in (b)(4) cases).[10]

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[10] As the Deputy Solicitor General's colloquy with Justice Scalia in *Freytag* indicates, the "due regard" requirement of Rule 183 means that the Tax Court *must* defer to a special trial judge's credibility determinations:

> QUESTION: What does it mean to give due regard to that? Doesn't that mean that you – you defer to – to the finding of fact?
>
> MR. ROBERTS: No.
>
> QUESTION: If it doesn't mean that, it's meaningless, isn't it?
>
> . . . .
>
> You think due regard means no regard?
>
> MR. ROBERTS: No, I think due regard means due regard. And in – in the case of credibility determination, the regular tax court judge will give due regard. . . .

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Moreover, this deferential standard of review effectively raises the level of proof a taxpayer must meet when presenting his case to the special trial judge in the first instance. Under established Tax Court procedure, the parties are not given any opportunity to challenge the findings or opinion of the special trial judge or otherwise point out to the Tax Court division any errors in the special trial judge's report.[11] Because Tax Court

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> QUESTION: But he's not – he's not going to interview witnesses. To give due regard to that individual's ability to see the witnesses is to defer to that – to that individual's judgment. And nobody would read it any other way.

Official Transcript Proceedings Before the Supreme Court of the United States, *supra*, at 38-39.

[11] Rule 183 used to allow the parties to file objections to the report of a special trial judge. However, the Rule was amended in 1984 and this provision was deleted. *See* 81 T.C. 1069-70 (1984). Under amended Rule 183, a special trial judge who has been assigned a case under (b)(4) will hear all the evidence, rule on all motions, and the parties will submit their post-trial briefs to the special trial judge. Tax Court Rule 183(a). The special trial judge will then prepare his findings of fact and opinion and submit this report directly to the Chief Judge of the Tax Court, who will assign the report to a division of the Tax Court for review and entry of a final decision. Rule 183(b). No provision of the Tax Court's rules permits the parties to see or object to the report of the special trial judge before it is adopted by the Tax Court.

Furthermore, no provision of the Rules permits the Tax Court to review the rulings of a special trial judge on any pretrial or post-trial motions, nor can the Tax Court review any rulings the special trial judge may make during trial. Only the final report of the special trial judge is subject to any review under Rule 183.

procedure does not permit a taxpayer to object to the report of a special trial judge, a taxpayer has no opportunity to show why the report is "clearly erroneous." Given the fact that the reports of special trial judges can never even be seen, much less challenged, by taxpayers before the Tax Court enters a decision on the report, and the fact that the report can be altered only if "clearly erroneous," it is perhaps not surprising that the Tax Court has never, in any reported decision, successfully reversed a decision of a special trial judge.[12] As a result, taxpayers essentially must prove their case before the special trial judge not merely by a preponderance of the evidence, but by something much more, in order to obtain a favorable decision from the Tax Court.

When Congress determined that the regular judges of the Tax Court should make the decision in (b)(4) cases it meant that those judges should independently review the evidence and reach their own decisions based upon that evidence. It is inconceivable that Congress meant to allow

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[12] The one time the Tax Court attempted such a reversal, in *Rosenbaum v. Commissioner*, 45 T.C.M. 825 (1983), it was promptly reversed by the D.C. Circuit in *Stone, supra*, because the Tax Court did not accord sufficient deference to the findings of the special trial judge.

In fact, since Rule 183 was amended to preclude taxpayers from objecting to the reports of special trial judges, the Tax Court routinely adopts the report of a special trial judge *verbatim*. *See, e.g., Pauli v. Commissioner*, 58 T.C.M. (CCH) 9 (1989); *Denali Dental Service v. Commissioner*, 58 T.C.M. (CCH) 13 (1989); *King Shipping Consumer, Inc. v. Commissioner*, 58 T.C.M. (CCH) 574 (1989); *Quinones v. Commissioner*, 55 T.C.M. (CCH) 1121 (1988); *Olken v. Commissioner*, 54 T.C.M. (CCH) 1172 (1987).

the Tax Court to routinely presume the factual findings of special trial judges in (b)(4) cases to be correct, or to adopt the findings of special trial judges wholesale, subject only to a very deferential "clearly erroneous" standard of review. And Congress most certainly did not intend to raise the level of proof a taxpayer must meet in (b)(4) cases when it permitted those cases to be heard, but not decided, by special trial judges. But the standard of review required by Rule 183 does not give the taxpayer what Congress intended the taxpayer to have: a decision, based upon an independent evaluation of the evidence, actually made by the Tax Court.[13]

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[13] We anticipate that the government may argue that the question presented is not ripe because the special trial judge has not yet issued his report. However, there is no ripeness issue in this case because the Tax Court has ordered that this case be "dispos[ed]" of by the special trial judge pursuant to Rule 183. No further factual development is necessary because it is a foregone conclusion that whatever decision the special trial judge reaches, the Tax Court can review it only for clear error at best. *See, e.g., Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 143 (1974) (where applicability of statute against petitioner was patent, it is irrelevant to question of justiciability that there will be some time delay before the disputed provision will go into effect).

Moreover, the prospect of such review means that the taxpayer must alter its behavior now: it must be prepared to prove its case not merely by a preponderance of the evidence, but by something more. This result can be avoided only if this Court resolves now the question presented. *See, e.g., id.* at 124 (where petitioner would suffer injury if Court did not resolve issue presented at that time, issue was ripe for decision).

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B. The Statute Does Not Give The Tax Court Discretion To Establish Any Standard Of Review For The Findings Of A Special Trial Judge In This Case Other Than De Novo

Sections 7443A(b)(1) through (b)(3) of Title 26 provide that the Chief Judge of the Tax Court may assign any declaratory judgment proceeding or any so-called small tax case to "be heard" by a special trial judge. (A75). Section 7443A(b)(4) provides that the Chief Judge may assign "any other proceeding which the chief judge may designate" to "be heard" by a special trial judge. (A75). Section 7443A(c) provides that the Tax Court "may authorize a special trial judge to make the decision of the court" in any proceeding "described in paragraph (1), (2), or (3) . . . subject to such conditions and review as the court may provide." (A75).

These statutory provisions indicate that Congress never authorized the Tax Court to assume a remote supervisory posture in (b)(4) cases such as this one but

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Finally, the special trial judge's conduct of the proceedings will be unalterably governed by the standard of review to which his report will be subject and the level of decisional authority he believes he has. If his report will be reviewed only for clear error, the special trial judge can make his decision without detailing every fact or inference that led to his conclusion. If, however, his report will be reviewed *de novo*, or will perhaps serve merely as an aid to a regular Tax Court judge who will in fact make the decision, then the special trial judge must be careful to include in his report any fact or inference that might possibly influence the ultimate decision. For these reasons, objections to Rule 183 must be raised and resolved now.

intended regular Tax Court judges to decide (b)(4) cases in the first instance. Congress plainly did not identify (b)(4) cases as those in which the Tax Court is empowered to establish any standard of review. The only possible inference from the fact that the Tax Court lacks the power to set a standard of review in (b)(4) cases is that Congress did not intend the Tax Court to exercise appellate supervision of special trial judge findings and opinions in (b)(4) cases. Rather, Congress intended the Tax Court to decide (b)(4) cases in the first instance, and not merely to review the findings and opinions of a special trial judge as a quasi appellate tribunal. At the very least Congress intended the Tax Court to review the findings of a special trial judge *de novo*. *See, e.g., Freytag*, 904 F.2d at 1015 & n. 8.

This reading of § 7443A(b)(4) and (c) is borne out by the legislative history of these provisions. In 1969 Congress provided for a full-time office of "commissioner," which was later redesignated as "special trial judge." Tax Reform Act of 1969, Pub. L. No. 91-172, § 958, 83 Stat. 487, 734.[14] The principal use Congress first envisaged for these officers was presiding in cases filed under the newly enacted small case procedure, under which taxpayers with small amounts at issue could present their cases under informal procedures. Tax Reform Act of 1969, Pub. L. No. 91-172, § 957, 83 Stat. 487, 734 (codified as

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[14] This provision was originally codified at 26 U.S.C. § 7456(c), but has been recodified, as amended, at 26 U.S.C. § 7443A. The title "commissioner" was formally replaced with "special trial judge" in 1984. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 464, 98 Stat. 494, 824.

amended at 26 U.S.C. § 7463). Such "small tax cases" would "not be a precedent for future cases and would not be reviewable on appeal." S. Rep. No. 91-552, 91st Cong., 1st Sess. 303 (1969); 26 U.S.C. § 7463(a) and (b). Even in these cases a special trial judge could only hear, and not finally decide, the case.

In 1974 Congress authorized the Tax Court to assign declaratory judgment actions involving retirement plans to special trial judges for hearing and decision.[15] In 1976 Congress expanded the authority of special trial judges to hear and decide certain declaratory judgment actions.[16] Finally, in 1978, Congress enabled special trial judges to hear and decide additional, enumerated declaratory judgment actions and, for the first time, authorized special trial judges to make the decision in small tax cases.[17] These decisions of special trial judges were "subject to such conditions and review as the court may by rule provide." *See* Revenue Act of 1978, Pub. L. No. 95-600, §§ 336(b)(1), 502(b), 92 Stat. 2841 & 2879.[18] The Tax Court

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[15] *See* The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 1041(a), 88 Stat. 829.

[16] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1042, 1306, 90 Stat. 1717.

[17] *See* Revenue Act of 1978, Pub. L. No. 95-600, §§ 336(b)(1), 502(b), 92 Stat. 2841 & 2879.

[18] This provision authorizing special trial judges (then called "commissioners") to decide certain limited cases was originally codified at 26 U.S.C. § 7456(c) and, regarding small tax cases, at 26 U.S.C. § 7463(g). In 1984 these provisions were consolidated at 26 U.S.C. § 7456(d), and in 1986 they were recodified at 26 U.S.C. § 7443A(b). *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1556(a), 100 Stat. 2085, 2755.

was thus, in these limited categories of cases, free to decide for itself whether to review the decisions of special trial judges, and if so, to set the standard of review by rule or other unpublished directive of the court. *See* H.R. Conf. Rep. No. 1800, 95th Cong., 2d Sess. 278 (1978).[19]

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[19] Congress was very clear, however, that even in these carefully defined cases the Tax Court was not to routinely permit special trial judges to make the decision of the Tax Court:

> In order to provide the court with flexibility in carrying out this provision [permitting certain declaratory judgment actions to be filed in the Tax Court], the bill authorizes the Chief Judge of the Tax Court to assign the Commissioners of the Tax Court to hear and make determinations with respect to petitions for a declaratory judgment, subject to such conditions and review as the Court may provide. *Your committee wishes to make clear that it is not intended that this be construed as indicating that all of these proceedings be heard by commissioners and decisions entered by them rather than by the judges of the court.* Instead, it is intended to provide more flexibility to the Tax Court in the use of commissioners in these types of cases. It is anticipated, for example, that if the volume of these cases should be large, that the Tax Court will expedite the resolution of these cases *by authorizing commissioners to hear and enter decisions in cases where similar issues have already been heard and decided by the judges of the court* or in other cases where, in the discretion of the court, it is appropriate for commissioners to hear and decide cases.

H. Rep. No. 94-658, 94th Cong., 2d Sess. 245 (1975) (emphasis added). Thus, Congress has consistently indicated that special trial judges are to be used for decision-making only in limited cases where the factual or legal issues have already been resolved by regular Tax Court judges.

In 1984 Congress added the provision now found in § 7443A(b)(4) allowing the Tax Court to assign a special trial judge to hear "any other proceeding which the Chief Judge may designate." *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 463(a), 98 Stat. 494, 824 (1984). At the same time, the statute was amended to provide that special trial judges could make the decision of the Tax Court *only* in those cases in which Congress had previously authorized special trial judges to make the decision. *Id.*[20] Congress' intent was clearly that "special trial judges [would] not be authorized to enter decisions in this [new] category of cases," H.R. Rep. No. 98-432, 98th Cong., 2d Sess. 1568 (1984). No provision was made for the Tax Court to establish any standard of review of special trial judge findings in this new category of cases because Congress intended regular Tax Court judges to act as the initial fact-finder and not as a reviewing tribunal.

Congress enabled special trial judges to decide only certain limited cases that characteristically are simpler and of little, if any, precedential value.[21] In these

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[20] As noted, these provisions were recodified in 1986 at 26 U.S.C. § 7443A. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1556(a), 100 Stat. 2755. The provision allowing special trial judges to decide declaratory judgment and small tax cases was recodified at § 7443A(c), while the enumeration of cases to which special trial judges could be assigned was codified at § 7443A(b). *Id.*

[21] The cases in which a special trial judge may make the decision of the Tax Court share certain characteristics that are notably absent from the cases, such as this case, usually assigned pursuant to § 7443A(b)(4). Declaratory judgment actions, assigned to special trial judges pursuant to

(Continued on following page)

relatively simple cases, the Tax Court may decide whether to review the decisions of special trial judges, and if so, under what standard of review. But, although more complex cases can now be assigned to special trial judges for hearing under § 7443A(b)(4), such cases cannot be assigned to special trial judges for decision and the Tax Court has no authority to set any standard of review for the findings of special trial judges. The absence of such statutory authority and Congress's explicit intent that special trial judges not decide (b)(4) cases, together with the fact that special trial judges can actually make decisions only in relatively simple or insignificant cases, indicates that in (b)(4) cases the regular Tax Court judges

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(Continued from previous page)

§ 7443A(b)(1), are generally limited to those involving retirement plans (26 U.S.C. § 7476), qualification of certain tax exempt organizations (26 U.S.C. § 7428(a)), and certain government obligations (26 U.S.C. § 7478). Each of these cases almost always comes before the Tax Court with a factual record fully developed during the administrative process. See M. Garbis, P. Junghans, S. Struntz, *Federal Tax Litigation: Civil Practice & Procedure* ¶ 21.02[1] (1985). Thus, a special trial judge will not preside over a full trial or resolve disputed factual issues and the legal issues are limited.

Small tax cases, assigned to special trial judges pursuant to 26 U.S.C. § 7443A(b)(2) and (3), are cases involving less than $10,000 in alleged deficiencies assigned to a special trial judge either with or without the consent of the parties. The decisions of special trial judges in these cases *cannot be appealed* and have *no precedential value*. Moreover, these cases are tried under very informal procedures, under which "legal issues are deemphasized, the rules of evidence are relaxed, and the court has discretion to act in such a manner as to make it feasible for the taxpayer to try [the] case by himself with some reasonable probability of success." *Id.* at ¶ 14.01.

must actually review the evidence presented, carefully consider the legal issues, and then make the decision for the Tax Court. To the extent that the regular judges are reviewing findings and conclusions already made by special trial judges, they must at least review those findings and conclusions *de novo*. *See, e.g., Freytag*, 904 F.2d at 1015 & n. 8.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 274, 275 August Term, 1990

(Argued October 24, 1990 Decided April 2, 1991)

Docket Nos. 90-4060, 90-4064

SAMUELS, KRAMER & COMPANY,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before: MESKILL and ALTIMARI, *Circuit Judges,* and METZNER,* *District Judge.*

Interlocutory appeal from an order of Chief Judge Arthur L. Nims, III of the United States Tax Court denying the motions of appellant Samuels, Kramer & Company to vacate the assignment to a special trial judge of two cases challenging the Commissioner of the Internal Revenue Service's assessment of tax deficiencies. Appellants challenge both the statutory and constitutional authority of the Tax Court's Chief Judge to make such assignments.

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* Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

Affirmed on other grounds.

KATHLEEN M. SULLIVAN, Cambridge, MA (Brian Stuart Koukoutchos, Cambridge, MA, Richard J. Sideman, Martha A. Boersch, Sideman & Bancroft, San Francisco, CA, of counsel), *for Appellant Samuels, Kramer & Co.*

KENNETH W. STARR, Solicitor General, Department of Justice, Washington, D.C. (Shirley D. Peterson, Assistant Attorney General, John G. Roberts, Jr., Deputy Solicitor General, Stephen J. Marzen, Assistant to the Solicitor General, Gary R. Allen, Steven W. Parks, Department of Justice, Washington, D.C., of counsel),
for Appellee Commissioner of Internal Revenue

ERWIN N. GRISWOLD, Washington, D.C. (Michael Doss, Jones, Day, Reavis & Pogue, Washington, D.C., of counsel),
for Amicus Curiae Erwin N. Griswold

MESKILL, *Circuit Judge*:

Samuels, Kramer, & Company (the Company) challenges the authority of the Chief Judge of the United States Tax Court to appoint "special trial judges" and to assign the adjudication of tax cases involving complex issues and substantial deficiency assessments to these "special judges" pursuant to 26 U.S.C. §§ 7443A(a) and 7443A(b)(4). The Company submits that section 7443A does not authorize the assignment of such cases to "special trial judges," and if authorized, the Chief Judge's appointment of such judges violates the Appointments Clause of the United States Constitution, Article II, Section 2, Clause 2.

BACKGROUND

The Company is a Nevada corporation with its principal place of business in New York City. The Company invested, for itself and for others, in straddles in forward contracts to buy and to sell government securities. Specifically, the Company would agree to buy (a long position) or to sell (a short position) at a pre-set price certain securities on a specific date in the future. As a straddle investor, the Company would hold an equal number of long and short positions in the same underlying security. This investment strategy permitted favorable tax treatment of both gains and losses.

In July 1984, after auditing the Company's tax returns for the years 1979, 1980, and 1981, the Commissioner of the Internal Revenue Service (Commissioner) notified the Company of a tax deficiency in an aggregate amount of approximately $1.4 million. The Commissioner also imposed pursuant to 26 U.S.C. § 6653(b) a civil fraud penalty of $568,291 in connection with the Company's return for the 1979 tax year and assessed interest at the penalty rate of 120 percent of the ordinary underpayment rate pursuant to 26 U.S.C. § 6621(c)(1). In March 1986, after auditing the Company's return for the tax year ending October 31, 1982, the Commissioner notified the Company of a deficiency in the amount of $20,300 and assessed additional penalties. In both instances, the Commissioner asserted that the Company's straddle investments were sham transactions which lacked economic substance and which had not been entered into for profit. Indeed, with respect to the pre-1982 tax years, the IRS took the position that these transactions were "entered

into solely or primarily to reduce income taxes by converting short term capital gain and ordinary income to long term capital gain income and defer reporting the same." The Commissioner asserted several other arguments to support the deficiency assessment.

In response to these notifications and assessments, the Company availed itself of its right to contest the deficiencies in the United States Tax Court. The Company filed two petitions with the Tax Court seeking redetermination of the deficiencies. The Chief Judge of the United States Tax Court, Arthur L. Nims, III, acting pursuant to 26 U.S.C. § 7443A and Tax Court Rules of Practice and Procedure 180, 181, and 183, assigned each of the Company's petitions to special trial judge Carleton D. Powell "for trial or other disposition."

The Company and other Tax Court petitioners, who also had their cases assigned to a special trial judge, moved to vacate the assignment of their cases on the grounds that the assignment was not authorized by section 7443A, and , if authorized by section 7443A, violated the Appointments Clause of the Constitution, Article II, Section 2, Clause 2. The Tax Court consolidated the cases for purposes of ruling on the motions to vacate the assignments.

On April 9, 1990, in an opinion reviewed by the full Tax Court pursuant to 26 U.S.C. § 7460(b), the Tax Court denied the motions to vacate the assignments (two judges did not participate). *First Western Gov't Sec., Inc. v. Commissioner*, 94 T.C. 549 (1990). The Tax Court concluded (1) that the language, structure, and legislative history of section 7443A clearly demonstrates Congress' intent to

assign "any other proceeding" to a special trial judge for hearing and report, and (2) that the Tax Court is a "Court of Law" within the meaning of the Appointments Clause and that special trial judges are "inferior officers" within the meaning of that Clause. Thus, the Tax Court held that the appointment of a special trial judge by the Chief Judge of the Tax Court comported with the Appointments Clause.[1] In an order accompanying its opinion, the Tax Court certified the issues advanced by the Company and the other petitioners for interlocutory appeal pursuant to 26 U.S.C. § 7482(a)(2). The Tax Court also stayed all the proceedings pending resolution of any interlocutory appeal. On April 18, 1990, the Company filed a motion in this Court for leave to appeal and on May 16, 1990, we granted the motion.

DISCUSSION

The United States Tax Court was created by Congress to provide taxpayers with a means of challenging assessments made by the Commissioner without first having to pay the alleged deficiency. Without such a forum, taxpayers would have to pay the asserted deficiency and then initiate a suit in federal district court for a refund. The Tax Court is currently composed of nineteen judges who are appointed by the President with the advice and consent of the Senate. The judges serve fifteen year terms and are paid at the same rate and in the same installments as federal district court judges. 26 U.S.C. § 7443.

The Company does not challenge the legitimacy of the Tax Court. Rather, the Company questions the constitutional authority of the Chief Judge of the Tax Court to

appoint "special trial judges" and his statutory authority to assign large tax cases to these judges for adjudication. We, therefore, must address two basic issues: (1) whether 26 U.S.C. § 7443A permits the assignment of a tax case that involves complex issues and a large deficiency assessment to a "special trial judge" for adjudication, and (2) if permitted, whether the Appointments Clause of the Constitution permits the Congress to vest the Chief Judge with the power to appoint a "special trial judge."

A. Scope of Review

The Courts of Appeals have jurisdiction to review the decisions of the Tax Court. 26 U.S.C. § 7482(a)(1). In general, Tax Court decisions are to be reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a). An appeal of an interlocutory order, however, is permissive and is not a matter of right. *Id.* at § 7482(a)(2)(A). Here, we granted the application of the taxpayer to review the Tax Court's interlocutory order addressing the authority of the Chief Judge to appoint special trial judges and to assign complex cases to these judges. The questions before us present pure issues of law. As such, we review the Tax Court's determinations *de novo*. *Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1413 (9th Cir. 1986).

B. Authority Under Section 7443A

In challenging the power of the Chief Judge of the Tax Court to assign cases to a "special trial judge," the

Company asserts that the language and structure of section 7443A clearly demonstrate that Congress did not intend complex tax cases involving substantial deficiencies to be assigned to special trial judges. We, therefore, must interpret the language of this provision.

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.' " *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, *J.*, concurring)). The plain meaning of the statute's language should control except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In such cases it is the intention of the legislators, rather than the strict language, that controls. *Id.* Finally, "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations omitted). With these guiding principles in mind, we turn to the statute and its language.

Section 7443A confers on the Chief Judge of the Tax Court the authority to appoint a special trial judge and to assign certain tax cases to such judges for adjudication. Section 7443A provides, in pertinent part:

> (a) *Appointment*
>
> The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

(b) *Proceedings which may be assigned to special trial judges*

The chief judge may assign –

(1) any declaratory judgment proceeding,

(2) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463,

(3) nor the amount of any claimed overpayment exceeds $10,000, and

(4) *any other proceeding which the chief judge may designate* (emphasis added),

to be heard by the special trial judges of the court.

(c) *Authority to make court decision*

The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

26 U.S.C. § 7443A.

The central question we must address is whether the phrase "any other proceeding," which is found in subsection (b)(4), permits the assignment of any tax case to a special trial judge, or if (b)(4) assignments are limited to small and non-complex cases. The Company concedes that the phrase "any other proceeding" when read in isolation could be construed to permit the assignment of cases similar to those that provided the basis for this appeal. The Company, however, relying on the rule of *ejusdem generis*,[2] argues that given the entire structure of

section 7443A the phrase "any other proceeding" should not be read so broadly. It is the Company's view that the phrase "any other proceeding" only encompasses proceedings of a similar nature to those enumerated in section 7443A(b)(1)-(3), *i.e.*, matters that involve a small amount, matters that do not involve complex issues, and matters in which the scope of trial is limited. Any other interpretation, reasons the Company, would render the limitations imposed by subsections 7443A(b)(1)-(3) a nullity. In support of this argument, the Company relies on the Supreme Court's decision in *Gomez v. United States*, 490 U.S. 858 (1989).

In *Gomez*, the Supreme Court construed the provisions of the Federal Magistrates Act, 28 U.S.C. § 631 *et. seq*. In particular, one section of the Magistrates Act permitted federal magistrates to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). This general grant of authority followed a list of specifically enumerated duties which a district judge could delegate to a magistrate. The question before the Court was whether this general provision permitted the assignment to a magistrate of juror *voir dire* in a criminal case. In holding that the Magistrates Act did not permit a district court to assign *voir dire*, the Court stated:

> When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties.

Gomez, 490 U.S. at 864. The Court concluded that Congress did not intend magistrates to preside over important stages of a felony trial. Jury *voir dire* was found to be one of these important stages. The Court rested its decision on two grounds: (1) the statute expressly specified those functions that magistrates were authorized to conduct, and (2) the legislative history was replete with statements that magistrates were only to handle "subsidiary matters" thereby demonstrating Congress' intent to limit the responsibilities of the magistrates. *Id.* at 872.

The Company's reliance on *Gomez* is misplaced. Here, unlike the situation in *Gomez*, the statute itself draws a distinction between the categories of cases enumerated in subsections (b)(1)-(3) and the category of "any other proceeding" found in subsection (b)(4). The first three categories are (1) declaratory judgment proceedings, (2) small cases involving less that $10,000 conducted under section 7463, and (3) other cases involving less than $10,000. Where a special trial judge is assigned a case pursuant to subsections (b)(1)-(3), the Tax Court *may* authorize the special trial judge to render a final decision. 26 U.S.C. § 7443A(c). Special trial judges, however, *cannot* render the final decision of the Tax Court in cases assigned under the fourth category – "any other proceeding."[3] *See id.*

This statutory distinction demonstrates that Congress intended to differentiate (b)(4) cases, in which the ultimate decisional authority remains with the Tax Court, from those cases in which a special trial judge may make the final decision. Congress' decision to vest final decisional authority exclusively in the Tax Court in subsection (b)(4) cases is a clear indication of its intention to

permit the assignment of complex cases to special trial judges. We, therefore, decline to adopt the Company's proposed construction because to do so would render superfluous the distinction drawn by the plain language of subsection (c).

The legislative history of section 7443A lends little, if any, support to the Company's argument. Under 26 U.S.C. § 7456 (1982), the predecessor to section 7443A, special trial judges were referred to as "commissioners."[4] Tax Reform Act of 1984, P.L. No. 98-369, §§ 463, 464, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 824-25. The commissioners were only authorized to hear minor tax cases and declaratory judgment disputes. *See* 26 U.S.C. § 7456 (1982) (current version at 26 U.S.C. § 7443A). These small cases could not be appealed and they had no precedential value. *Id.* In 1984 Congress made several amendments to section 7456. Specifically, the term "special trial judge" was adopted to replace the term "commissioner," section (d)(3) was changed to raise the maximum amount in dispute provision from $5,000 to $10,000, and subsection (d)(4) providing for the assignment of "any other proceeding" was added. Tax Reform Act of 1984, §§ 463, 464. At the same time, the Chief Judge was given authority to permit special trial judges to render final decisions in cases arising under subsections (d)(1)-(3). *Id.* The statutory provisions addressing the role of special trial judges were ultimately consolidated and recodified in section 7443A. Tax Reform Act of 1986, P.L. No. 99-514, § 1556, 1986 U.S. Code Cong. & Admin. News (99 Stat.) 2754-55 (recodifying section 7456(d)(1)-(4) at section 7443A(b)(1)-(4) & (c)).

The Company submits that Congress, in adopting these amendments, did not intend to grant special trial judges the authority to hear complex cases. The Company

places great emphasis on the limited legislative history that accompanied the amendments. In explaining the basis for adopting the present section 7443A(b)(4), the Report of the Committee on Ways and Means stated:

> Reasons for Change
>
> The committee wishes to clarify that additional proceedings may be assigned to Commissioners [Special Trial Judges] so long as a Tax Court judge must enter the decision.
>
> Explanation of Provision
>
> A technical change is made to allow the Chief Judge of the Tax Court to assign any proceeding to a special trial judge for hearing and to write proposed opinions, subject to review and final decision by a Tax Court judge, regardless of the amount in issue. However, special trial judges will not be authorized to enter decisions in this latter category of cases.

H.R. Rep. No. 432, 98th Cong., 2d Sess. 1568, *reprinted in* 1984 U.S. Code Cong. & Admin. News 697, 1198. The Company focuses on the phrase "a technical change" and argues that its use indicates that Congress did not intend to expand substantively the authority of special trial judges. We disagree.

When read in its entirety, the legislative history shows that Congress knowingly expanded the authority of special trial judges and appreciated the significance of that action. In particular, Congress not only removed the "maximum amount in dispute" jurisdictional requirement, but also precluded special trial judges from entering the final decision in any cases assigned pursuant to

this provision. That responsibility was reserved exclusively for judges of the Tax Court. As the Conference Report emphasized: "The House Bill also provides that other proceedings may be assigned to be heard by [special trial judges], but no decision with respect to these proceedings may be made by a [special trial judge]." H.R. Conf. Rep. No. 861, 98th Cong., 2nd Sess. 1127, *reprinted in* 1984 U.S. Code Cong. & Admin. News 1445, 1815.

Given the plain language of section 7443A and its legislative history, we conclude that Congress in using the phrase "any other proceeding" intended to authorize the Chief Judge of the Tax Court to assign any tax case, regardless of complexity or amount in controversy to a special trial judge for adjudication. We reach this conclusion ever mindful of the settled rule of construction that requires " '[f]ederal statutes . . . to be so construed as to avoid serious doubt of their constitutionality. " *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (quoting *Machinists v. Street*, 367 U.S. 740, 749 (1961). We recognize that our construction of section 7443A raises serious questions under the Appointments Clause of Article II of the Constitution. When confronted with such a situation, however, the Supreme Court has counselled:

> [T]his canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; " ' – [a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . ' or judicially rewriting it."

Id. (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961))). Unable, in this instance, to avoid the plain import of the statute's language and of Congress' intent, we now direct our attention to the Company's constitutional challenge.

C. The Appointments Clause

The Company submits that if section 7443A is found to permit the assignment of complex cases involving large amounts in controversy to a special trial judge, then the statute violates the Appointments Clause of the Constitution, Article II, Section 2, Clause 2. It argues that a special trial judge is an "officer" of the United States who must be appointed in compliance with the Appointments Clause. The Appointments Clause provides in pertinent part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Thus, the Constitution divides into two classes all the nation's officers that are deemed subject to appointment. *United States v. Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may

allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Assuming that a special trial judge is an "officer," the Company contends that the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power.

1. Waiver

At the outset, we address the Commissioner's argument that the Company has waived its right to challenge the constitutional propriety of section 7443A. The Commissioner contends that the Company waived its right to challenge the constitutionality of section 7443A when it chose to litigate its tax deficiencies in the Tax Court, rather than to pay the tax assessed and then seek a refund in federal district court. We disagree.

Although it is true that the Company affirmatively elected to proceed in the Tax Court, this choice of forum in itself cannot be equated with a waiver of constitutional safeguards. The Commissioner cites *Freytag v. Commissioner*, 904 F.2d 1011, 1015 n.9 (5th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3501 (U.S. Jan. 22, 1991), to support the proposition that taxpayers who voluntarily submit to having their claims adjudicated in the Tax Court waive certain constitutional protections.[5] In *Freytag*, the taxpayer first raised the Appointments Clause challenge to section 7443A on appeal and no objection was made at the time of the initial assignment of the case. This fact in itself serves to distinguish *Freytag* from the instant case wherein the Company challenged the assignment of its

cases to a special trial judge from the outset. However, the Commissioner, relying on *Freytag*, argues that since Congress need not provide citizens with a forum in which to adjudicate their tax disputes prior to actual payment of an assessment, taxpayers cannot challenge the structure of the forum that Congress chose to create.

It is well settled that Congress has the discretion whether, and to what extent, to waive the government's sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399 (1976). Starting from this premise, the Commissioner reasons that when Congress chooses to waive this immunity it can impose whatever conditions it sees fit. We find this analysis to be unduly superficial and fatally flawed. Nothing in the language of section 7443A suggests that Congress intended to limit a citizen's right to challenge the constitutional authority of a statutorily designated decisionmaker. Although Congress can prescribe conditions when it chooses to provide a waiver of sovereign immunity, *Cheatham v. United States*, 92 U.S. 85, 88-89 (1876); *Ex Parte Bakelite Corp.*, 279 U.S. 438, 453-54 (1929) (Congress can condition resort to Claims Court on waiver of right to jury trial); *see also* 28 U.S.C. §§ 2674, 2402 (no right to jury trial in federal tort claims actions against the United States), we find no indication that Congress intended to do so in this instance. Here, Congress did not condition resort to the Tax Court on a citizen's waiver of the right to challenge the constitutional authority of the Tax Court's Chief Judge to appoint.[6]

Given that citizens are always free to consent to have their disputes adjudicated by private arbitrators and to waive their personal constitutional rights, the Commissioner also argues that taxpayers can consent to have

their disputes resolved by the special trial judges. While the general principles relied on by the Commissioner are well established, *see, e.g., Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (waiver of right to jury trial by entering guilty plea); *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (criminal defendant can waive jury trial); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 128-29 (1865) (appointment of arbitrator with consent of both parties is permissible); Fed. R. Civ. P. 38(d) (waiver of jury trial in civil cases), we find the situation before us to be of a fundamentally different character. A challenge to the constitutional legitimacy of a governmental decisionmaker is more akin to a challenge based on subject matter jurisdiction. An official's power to act is being directly attacked.

Although it is true that citizens are free to resort to private forums to resolve disputes and to waive personal constitutional rights, where Congress has seen fit to create a public forum, the characteristics of that forum must be consistent with the structural imperatives imposed by the Constitution. Structural protections such as those embodied in the Appointments Clause stand on a different footing from personal constitutional rights. As the Supreme Court has stated, "[t]o the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." *Schor*, 478 U.S. at 850-51 (discussing importance of preserving an independent judiciary under Article III). The *Schor* Court's further comments are particularly applicable here: "[N]otions of consent and waiver cannot be dispositive because the [Constitution's] limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851. If an official from the outset lacks

the constitutional status that is a prerequisite to holding and to executing the duties of a particular office, we fail to see how a citizen can be deemed to consent to the decisionmaking authority of this official through silence or mere submission to the jurisdiction of the forum of which that official appears to be a member. In order to exercise the powers of an office, the particular official, assuming he or she qualifies as an "officer" of the United States, must be appointed in accordance with the terms of the Appointments Clause. *Buckley,* 424 U.S. at 135, 138-39. Were such institutional interests – as distinguished from personal constitutional rights – so easily waived, the affirmative requirements imposed by the Appointments Clause would effectively be rendered null and void.

2. Special Trial Judge: Inferior or Superior Officer

The Company's Appointments Clause challenge is premised on the assumption that a special trial judge is either a principal or inferior officer of the United States. If we conclude that neither characterization is applicable and that a special trial judge is simply an employee, our analysis would be complete. Such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. *Buckley,* 424 U.S. at 126 n.162.

The Commissioner argues that special trial judges are mere employees because they exercise limited authority. The Company, however, submits that the duties performed by the special trial judges are quite substantive and require the exercise of broad discretion. Indeed, the Company goes so far as to argue that, as currently utilized, special trial judges function as *de facto* judges of the

Tax Court and should be viewed as principal officers subject to Presidential appointment and Senate confirmation. At a minimum, the Company asserts the special trial judges are inferior officers who must be appointed by the President, a "Court of Law," or a "Head of Department." To determine the appropriate manner of classifying the position of special trial judge, we must examine the structure of the Tax Court and the nature of the duties conferred on special trial judges.

The Tax Court is wholly a creature of Congress and its nineteen judges are appointed by the President and subject to Senate confirmation. 26 U.S.C. § 7443. Thus, the judges of the Tax Court are plainly principal officers within the meaning of Article II. Although the line between inferior and principal officers is far from clear and the Framers provided little guidance, *Morrison v. Olson*, 487 U.S. 654, 671 (1988), we find unpersuasive the Company's argument that the special trial judges are principal officers.

The Supreme Court in *Morrison* outlined four factors that must be examined to determine whether someone is a principal or an inferior officer: (1) the possibility of removal, (2) the scope of duties, (3) the scope of authority, and (4) the length of tenure. *Id.* at 671-72. In *Morrison*, the Supreme Court upheld the constitutionality of the provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599, which authorized the appointment of an independent counsel to investigate and to prosecute high ranking government officials for violations of federal criminal laws. Specifically, in examining the statute's appointment provisions, the Court held that the independent counsel was not a "principal officer" under Article

II. The Court, applying its four factor analysis, concluded that (1) the independent counsel was subject to removal by someone other than the President, (2) the duties of the office were limited, (3) the office's jurisdiction was restricted, and (4) the independent counsel's tenure was limited. *Id.*

Applying these criteria to the instant case, we conclude that a special trial judge is not a "principal officer." Special trial judges can be removed at anytime by the Chief Judge. The statute imposes no limitations on the power of the Chief Judge to remove any individual who is appointed as a special trial judge. The Chief Judge also has absolute control over the extent of the duties that are assigned to special trial judges. The statute at issue narrowly circumscribes the authority of the special trial judges. Indeed, in a section 7443A(b)(4) proceeding, the findings of a special trial judge, although subject to deference, can only be made final when adopted by a Division of the Tax Court. *See* Tax Court Rule of Practice and Procedure 183(c). Finally, in view of the above, a special trial judge's tenure is necessarily limited.

This conclusion does not end our analysis. A special trial judge may still be an inferior officer and, therefore, remain subject to the appointment provisions of Article II. As the Supreme Court has stated, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley,* 424 U.S. at 126. The Tax Court concluded that the special trial judges are inferior officers. *First Western Securities,* 94 T.C. at 558-59. We agree.

Although the ultimate decisional authority in cases under section 7443A(b)(4) rests with the Tax Court judges, the special trial judges do exercise a great deal of authority in such cases. The special trial judges are more than mere aids to the judges of the Tax Court. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. Contrary to the contentions of the Commissioner, the degree of authority exercised by special trial judges is "significant." *See Buckley*, 424 U.S. at 126. They exercise a great deal of discretion and perform important functions, characteristics that we find to be inconsistent with the classifications of "lesser functionary" or mere employee. *Cf. Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352 (1931) (United States commissioners are inferior officers).

3. The Power to Appoint

Having concluded that the special trial judges are "inferior Officers," we must now determine whether the Chief Judge of the Tax Court can constitutionally be vested with the power to appoint. The relevant language of the Appointments Clause bears repeating: "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Here, Congress clearly vested the Chief Judge of the Tax Court with the power to appoint special trial judges.[7] Although Congress has the authority to create offices and to provide for the method of appointment to those offices, "Congress' power . . . is

inevitably bounded by the express language of Art. II, § 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.' " *Buckley*, 424 U.S. at 138-39 (discussing Congress' power under the Necessary and Proper Clause). Therefore, the fundamental issue is whether the Appointments Clause empowers Congress to vest the Chief Judge of the Tax Court with the power to appoint special trial judges. Resolution of this question necessarily involves close scrutiny of the language of the Appointments Clause. In this case, it is beyond question that Congress had no intention of placing the power to appoint special trial judges in the President. We, therefore, are left with three other possibilities.

First, as the Company argues, we could conclude that the Tax Court is neither a "Court of Law" nor a "Department" within the meaning of Article II.[8] Under this scenario, the appointment power could not be vested constitutionally in the Chief Judge of the Tax Court. Second, as the Commissioner submits, the Tax Court could be treated as a department, with the Chief Judge as the duly authorized head of that department.[9] Third, as Amicus urges, the Tax Court could be held to be a "Court of Law" within the meaning of Article II. In upholding the Chief Judge's authority to appoint special trial judges, the Tax Court adopted this third rationale. *First Western Securities*, 94 T.C. at 561-63.

The question of whether the phrase "Courts of Law," as it is used in the Appointments Clause, encompasses Article I courts is one of first impression. In examining this important question, therefore, we must focus primarily on the Constitution's language and structure. The

existing Supreme Court precedent, however, does provide us with certain guideposts that can aid in our analysis.

4. The Constitutional Framework

Our inquiry into provisions of Article II necessarily requires us to analyze the very foundations of our system of government. In framing the Constitution, the Founding Fathers adopted a system of checks and balances to ensure that no one component of government would exercise too much power. To that end, " '[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.' " *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). As the Supreme Court has stated:

> The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with "[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States."

Id. at 722 (quoting Art. III, § 2). This fundamental principle of separation of powers has for over 200 years protected the property and liberty of our nation's citizens. "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document." *Buckley*, 424 U.S. at 124.

Although the Constitution sought to distribute power among the three branches, "the Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct." *Mistretta v. United States*, 489 U.S. 361, 380 (1989) (citations omitted); *see also Morrison*, 487 U.S. at 693-94 ("[W]e have never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.' "). Over the years, the Supreme Court has consistently recognized that in order to maintain an effective government our constitutional framework requires a certain degree of interdependence among the branches. *Buckley*, 424 U.S. at 121. The often quoted words of Justice Jackson emphasize this point:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion).

Historically, separation of powers jurisprudence has focused on the extent to which one branch aggrandizes its power at the expense of another branch or encroaches on the authority specifically reserved for a co-equal branch. *Mistretta*, 488 U.S. at 412 (placement of independent sentencing commission in judicial branch does not undermine authority of executive or legislative branches); *Morrison*, 487 U.S. at 695-96 (no aggrandizement of power where judicial branch appoints independent counsel); *Bowsher*, 478 U.S. at 734 (Congress' retention of power to

remove an officer performing executive functions results in aggrandizement of legislative power); *Chadha,* 462 U.S. 957-59 (one house legislative veto infringes on powers of executive). In each of these cases, the Supreme Court sought to balance the pragmatic concerns associated with the operation of an effective and efficient government with the institutional concern of remaining faithful to the fundamental governmental structure that the Framers incorporated into the Constitution. *See generally* Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government,* 57 U. Chi. L. Rev. 357 (1990) (deference to the governmental structure adopted by Framers is essential to maintenance of our constitutional framework and concerns of administrative convenience should not drive separation of powers analysis). The instant case requires us to struggle with these same competing principles. Although a pragmatic approach is often preferable, particularly where, as here, the potential for disruption to our constitutional scheme is minimal, we must be careful not to ignore the textual provisions of the Constitution and the principles they embody.

The principle of separation of powers is embedded in the Appointments Clause. *See Buckley,* 424 U.S. at 124-25; *but see* Blumoff, *Separation of Powers and the Origins of the Appointment Clause,* 37 Syracuse L. Rev. 1037, 1078 (1987) (Appointments Clause nothing more than the product of a political compromise and it should not be understood to reflect a consensus on the proper distribution of governmental power). That clause designates three repositories in which the Congress can place the power to appoint: "in the President alone, in the Courts of Law, or

in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Thus, the Appointments Clause only vests Congress with the authority to distribute the appointment power; Congress cannot reserve for itself the power to appoint. *See Buckley,* 424 U.S. at 132-33. Similarly, Congress cannot reserve for itself the power to remove the appointee. *Bowsher,* 478 U.S. at 726. Of the three potential repositories of the appointment power, two – the President and heads of departments – are in or at least connected with the Executive Branch, *Id.* at 127, and the remaining one – "Courts of Law" – has been interpreted to be in "the Judiciary." *Id.* at 132.

With these fundamental principles in mind, we direct our attention to the Company's specific challenge: Can the Chief Judge of the Tax Court constitutionally be vested by Congress with the power to appoint?

(a) Court of Law

The Company and the Commissioner assert that Article II's reference to "Courts of Law" is necessarily limited to courts created pursuant to Article III and that, therefore, the Chief Judge of the Tax Court, a non-Article III judge, constitutionally cannot be vested with the power to appoint under this designation. *Amicus* argues that this is too narrow a reading of Article II. He submits that the phrase "Courts of Law" means any court authorized by Congress to adjudicate cases.[10] *Amicus* points out that Article I confers on Congress the power "[t]o constitute Tribunals inferior to the supreme Court." U.S. Const. art. I, sec. 8, cl. 9. All the parties acknowledge that the creation of such "legislative courts" is constitutionally valid.

See Crowell v. Benson, 285 U.S. 22, 50-51 (1932) (under Article I Congress can establish courts to adjudicate public rights – rights which arise between governmental agencies and the citizens subject to the authority of these bodies); *Bakelite,* 279 U.S. at 451 (legislative courts may be used to determine matters that "do not require judicial determination and yet are susceptible of it"); *American Ins. Co. v. Canter,* 26 U.S. (1 Pet.) 511, 546 (1828) (Congress has the authority under Article I to create territorial courts that are not vested with the "judicial power" defined in Article III). *Amicus* goes one step further, however, and asserts that there can be little doubt that these Article I courts are "Courts of Law" within the meaning of Article II. In support of this proposition, *Amicus* points to the functions performed by the Tax Court and Congress' history of vesting Article I courts with the authority to appoint certain officers. We reject *Amicus'* arguments.

The provisions of Article II incorporate the principle of separation of powers, permitting the Congress to place the appointment power in the President, a head of department, or the "Courts of Law." The Constitution also gives the Congress a direct role in the appointments process by requiring the advice and consent of the Senate for the appointment of principal officers.

In identifying the "Courts of Law" as a potential repository of the appointment power, there is no indication that the Framers contemplated any courts other than provided for under Article III. Indeed, Article III contains the Constitution's only other use of the term "courts." Moreover, in interpreting the Appointments Clause, the

Supreme Court has declared that inferior officers can be appointed only by "the President alone, by the heads of departments, or by the *Judiciary.*" *Buckley,* 424 U.S. at 132 (emphasis added). The Supreme Court's consistent use of the term "Judiciary" emphasizes that Article II's reference to "Courts of Law" solely encompasses Article III courts. "The Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 58 (1982) (plurality opinion). The term "Judiciary" refers exclusively to those judges appointed in conformity with the requisites of Article III – life tenure and no diminution of salary. *Id.* at 59-60 & n.10. Only courts that possess the attributes prescribed in Article III can exercise the "judicial power" of the United States. *Id.* at 59. Although the Supreme Court has subsequently clarified certain statements made by the plurality in *Northern Pipeline, see Thomas v. Union Carbide Agric. Products Co.,* 473 U.S. 568, 584-86 (1985), the Court has not undermined the proposition that the term "Judiciary" refers exclusively to Article III courts.[11]

In pressing the argument that the Tax Court is a Court of Law, *Amicus* emphasizes that in several instances Congress has vested Article I courts with the power to appoint. For example, Congress vested several territorial and specialized courts with the power to appoint inferior officers – such as clerks and commissioners. *See* Act of June 4, 1812, ch. 95, § 10, 2 Stat. 743, 746 (giving Missouri territorial court the power to appoint a

clerk); Act of May 2, 1890, ch. 182, § 9, 26 Stat. 81, 86 (Oklahoma) (same); Act of June 6, 1900, ch. 786, § 6, 31 Stat. 321, 323 (Alaska) (same); Act of Feb. 24, 1855, ch. 122, §§ 3, 11, 10 Stat. 612, 613-14 (vesting Claims Court, which at the time was considered an Article I court, with power to appoint commissioners and a clerk). *Amicus* asserts that this tradition establishes that such bodies are "Courts of Law" within the meaning of the Appointments Clause. While we view this historical practice to be evidence that Article I courts can constitutionally be vested with the power to appoint, we do not believe that it necessarily establishes that such courts are permitted to be vested with this power because they are "Courts of Law" under Article II. *See Mistretta*, 488 U.S. at 401 (" 'traditional ways of conducting government . . . give meaning' to the Constitution") ((quoting *Youngstown Sheet & Tube*, 343 U.S. at 610) (concurring opinion)). It is equally probable, as we discuss *infra*, that these Article I courts were viewed as a department. In any event, Congress' vesting these "courts" with the power to appoint does not make the placement of that power necessarily constitutional.

Amicus encourages us to treat as secondary the formal constitutional distinctions between Article I and Article III. Instead, he suggests focusing on the functions performed by the Tax Court. *Amicus* reasons that because the Tax Court adjudicates disputes it must therefore be a "Court of Law." We do not dispute *Amicus'* factual assertions. Indeed, we acknowledge that the Tax Court performs many functions similar to those performed by Article III courts. The judges of the Tax Court hear evidence, make rulings, review briefs, and render opinions

that are binding on the parties and appealable to the Court of Appeals. These facts, however, do not necessarily lead to the conclusion that the Tax Court is a "Court of Law" as the term is used in the Appointments Clause. It is not enough merely to focus on the nature of the function being performed. *See Mistretta,* 488 U.S. at 386. Very often administrative agencies that are in or associated with the executive branch perform adjudicatory functions. *See Schor,* 478 U.S. at 850-854. One need only consider the operation of the Social Security Administration to recognize that our system of government is replete with instances of administrative agencies performing adjudicatory functions. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319 (1976). As Justice Brandeis once explained, the principle of separation of powers "left to each [Branch] power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Myers v. United States,* 272 U.S. 52, 291 (1926) (dissenting opinion). Certainly administrative agencies are not "Courts of Law," as that term is used in Article II, simply because they perform adjudicatory functions. A purely functional analysis, however, fails adequately to consider the importance of the Constitution's framework and often would lead to untenable results.

Despite the functional nature of the Tax Court and the fact that Article I courts historically have been vested with the power to appoint, we conclude, in light of the language of the Appointments Clause and the structure of the Constitution, that the Tax Court is not a "Court of Law" within the meaning of Article II.

(b) Department

Having concluded that the Tax Court is not a "Court of Law" within the meaning of the Appointments Clause, we must now determine whether the Tax Court is a "department" of which the Chief Judge is the "head," an argument advanced by the Commissioner but rejected by both the Company and *Amicus*. We find the argument advanced by the Commissioner to be persuasive.

We begin by repeating that the nature of the duties performed by an office does not determine where the appointment power for such an office can be properly placed. For instance, an officer's performance of traditionally recognized executive functions – such as prosecution – does not mean that he or she must be appointed by the executive. *See Morrison*, 487 U.S. at 675-77 (power to appoint special prosecutor can be vested in Article III court). As the Supreme Court has counselled, we should not give undue emphasis to the nature of the duties assigned to a particular office.

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.

Ex Parte Siebold, 100 U.S. 371, 397 (1880). The question where to place the Tax Court in our constitutional scheme leads us to an examination of the history of the Tax Court.

The United States Tax Court was originally established by an Act of Congress in 1924 as the Board of Tax Appeals and was designated as "an independent agency in the executive branch of the Government." Revenue Act of 1924, ch. 234, § 900(a), (k), 43 Stat. 336, 338. In 1942, Congress changed the name of the Board of Tax Appeals to the "Tax Court of the United States." Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957. Its designation as an independent agency within the Executive Branch, however, was not changed. Indeed, this designation continued until Congress enacted the Tax Reform Act of 1969, P.L. 91-172, tit. IX, § 951, 83 Stat. 487, 730 (codified as amended at 26 U.S.C. § 7441). That provision provided:

> There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.

Id. Congress' passage of the 1969 Tax Reform Act renaming this adjudicatory body the United States Tax Court does not in itself lead to the conclusion that Congress removed this body entirely from the Executive Branch. Likewise, we do not find the legislative history to indicate definitely where in our constitutional scheme Congress intended to place this adjudicatory body. The legislative history regarding the Tax Act of 1969 is rather limited. The Senate Report does demonstrate that Congress intended to cease classifying the Tax Court as an agency within the Executive branch. S. Rep. No. 552, 91st Cong., 1st Sess. 301, *reprinted in* 1969 U.S. Code Cong. & Admin. News 2027, 2340-41. While it is clear that Congress intended to establish a "court" pursuant to its Article I authority, it is equally apparent that Congress

realized that this Article I forum lacked the requisites of Article III status. *See generally id.* at 2343 n.3. The source from which the Chief Judge's appointment power was to be derived, however, is unclear. The lack of congressional clarity on the specific issue now before us is not surprising. Since the New Deal era, the "administrative state" has become an accepted and necessary element of our government. As yet, our constitutional precedent has failed to address specifically all the ramifications that stem from the continuing evolution in our governmental structure. For the reasons that we discuss *infra*, we believe that Congress' desire to create a "court" is not inconsistent with the conclusion that for purposes of the Appointments Clause the Tax Court is a department associated with the Executive branch.

Several factors lead us to conclude that the Tax Court remains a department associated with the Executive Branch. First, in examining the Founders' use of the phrase "Heads of Departments," the Supreme Court has explained: "The phrase 'Heads of Departments,' used as it is in conjunction with the phrase 'Courts of Law,' suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch." *Buckley*, 424 U.S. at 127. This explanation is particularly applicable to the Tax Court, The Tax Court serves as a forum to challenge tax deficiencies as determined by the Commissioner. The Internal Revenue Service is clearly within the province of the Executive Branch, specifically the Department of Treasury. Thus, in this respect, it can be said that the Tax Court "has some connection with [the Executive Branch]." This conclusion is further supported by Congress' decision to place the

predecessor to the Tax Court in the Executive Branch. In adopting the 1969 amendments, Congress explained: "The United States Tax Court established under the amendment made by section 951 is a continuation of the Tax Court of the United States as it existed prior to the date of enactment of this Act." Tax Reform Act of 1969, P.L. 91-172, tit. IX, § 961, 83 Stat. 487, 735. Thus, Congress did little more than change the label to be used when referring to this alternative forum for the resolution of tax disputes. We do not think that the label that Congress chooses to give an adjudicatory body determines its constitutional status. To so hold would render many of the Constitution's provisions superfluous.

Second, it is well established that Congress can provide for the adjudication of "public rights" in Article I courts. Public rights are those rights that arise "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell*, 285 U.S. at 50. The "public rights doctrine" has its basis in the principle of separation of powers, and the "historical understanding that certain prerogatives were reserved to the political Branches of Government." *Northern Pipeline*, 458 U.S. at 67. Indeed, the rationale underlying this understanding is that since Congress would be free to commit such matters exclusively to the executive branch for resolution, Congress can employ "the less drastic expedient of committing their determination to a legislative court or an administrative agency." *Id.* at 68. As the Supreme Court has summarized:

> In essence, the public rights doctrine reflects simply a pragmatic understanding that when

> Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced.

Thomas, 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68).

The Tax Court is the classic example of a forum that adjudicates "public rights." The relationship between the government and taxpayer plainly gives rise to public rights and we have no doubt that the resolution of such disputes can be relegated to a non-Article III forum. *Crowell*, 285 U.S. 50-51; *Bakelite*, 279 U.S. 450-51; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

The "public rights" doctrine rests on the premise that any matters subject to adjudication in Article I forums could have been conclusively determined by the executive or legislative branches in the first instance. *See Thomas*, 473 U.S. at 589; *Northern Pipeline*, 458 U.S. at 67-69; *Bakelite*, 279 U.S. at 451-53; *see also* Strauss, *supra* note 6, at 632 ("the whole point of the [traditional] 'public rights' analysis" has been "that *no judicial involvement at all* was required – executive determination alone would suffice"). Given the fact intensive nature of tax disputes, resolution of such claims would ordinarily be left to the executive. *See* Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 213 (1983) (summary). Thus, we find it entirely consistent with the reasoning underlying the "public rights" doctrine to treat the Tax Court as a department associated with the executive branch.

Third, legislative courts, such as the Tax Court, share many of the characteristics of administrative agencies. We believe that the work performed by legislative courts and adjudicatory agencies cannot be distinguished. *Id.* at 201. Both are bodies created by Congress under Article I to adjudicate federal rights and both lack the requisites of Article III status. "[F]rom the perspective of Article III, [there is] no difference in constitutional principle between legislative courts and administrative agencies." Fallon, *Of Legislative Courts, Administrative Agencies, and Article III,* 101 Harv. L. Rev. 915, 928 (1988) (citations omitted); *see also Northern Pipeline,* 458 U.S. at 113 (White, *J.,* dissenting) (noting that many Article I courts "go by the contemporary name of 'administrative agencies' "); Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence,* 39 Admin. L. Rev. 83, 98-100 (1987) (advocating treating independent agencies as Article I courts, yet recognizing that the constitutional status of both remains unclear); Miller, *Independent Agencies,* 1986 Sup. Ct. Rev. 41, 50 (noting that the term "independent agency" has never been conclusively defined and that Article I courts can properly be categorized in this manner); Redish, *supra,* at 201 ("Court cannot logically distinguish the work of non-Article III legislative courts from that of administrative adjudicatory bodies. Despite several differences in both appearance and operation, their work cannot be functionally or theoretically distinguished."). As one scholar has aptly explained:

> The members of administrative agencies do not wear robes or retain the other traditional indicia of judicial office. Nevertheless, these agencies are analogous to legislative courts because,

> although they may and often do perform adjudicatory functions, their members do not receive the salary and tenure protections of Article III.

Redish, *supra*, at 214. We, therefore, think it entirely consistent with the text of the Constitution and the existing precedent to treat Article I creatures, like the Tax Court, as departments, particularly where as here the matters being adjudicated could have been left to executive resolution.

Fourth, historically when analyzing Appointments Clause arguments, the Supreme Court has focused its attention on the question of which branch retains the authority to remove a particular officer. *See, e.g., Bowsher*, 478 U.S. at 724-26; *Wiener v. United States*, 357 U.S. 349 (1958); *Myers v. United States*, 272 U.S. 52 (1926). Here, the judges of the Tax Court are appointed by the President and removable by him, albeit only "after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." 26 U.S.C. § 7443(f); *compare* U.S. Const. art. III, § 1 (Article III judges serve during "good Behavior"). Thus, although insulated to a large extent, the judges of the Tax Court ultimately remain answerable to the President and are not wholly divorced from his oversight. In this regard, the analogy between the Tax Court and administrative agencies becomes even stronger. The principal officers of some agencies are presidentially appointed and serve for a term of years and are not removable at the will of the president. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that Congress can limit the President's removal power over independent agencies). While not having been subject to constitutional challenge, the

principal officers of such independent agencies have been presumed to be proper repositories of the appointment power. *See, e.g.*, 7 U.S.C. § 4a(e) (vesting the members, including the chairman, of the Commodities Future Trading Commission with the power to appoint); 15 U.S.C. § 78d(b) and Reorganization Plan No. 10 of 1950, effective May 24, 1950, 15 F.R. 3175, 64 Stat. 1265 (placing the power to appoint in the chairman of the Securities and Exchange Commission). Although such agencies have been deemed to be "independent" of the executive, they remain affiliated with the executive branch. *See generally* Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 Yale L.J. 1766 (1985) (arguing for increased executive control over "independent agencies"). Adopting the pragmatic approach endorsed by the Supreme Court in *Mistretta*, *Thomas* and *Morrison*, we conclude that legislative courts, like administrative agencies, are for purposes of the Appointments Clause most appropriately characterized as "departments" associated with the executive branch.

Finally, section 7443A places the power to appoint special trial judges in the Chief Judge of the Tax Court. 26 U.S.C. § 7443A(a). Congress chose to place the power in a specified office and not in the Tax Court itself. *Compare* 28 U.S.C. § 631(a) (placing power to appoint United States magistrates in all of the judges of each United States District Court); 28 U.S.C. § 152 (vesting United States Court of Appeals with the power to appoint bankruptcy judges). Clearly Congress knows how to place the appointment power in a judicial body as opposed to a particular office. Although not in itself definitive, we conclude that the decision by Congress to vest the Chief

Judge, a particular office, instead of the Tax Court itself, with the power to appoint, further supports the conclusion that the Tax Court is a "department" and the Chief Judge is the "head" of that department for purposes of the Appointments Clause.

Arguing on behalf of the Commissioner, the Solicitor General, in response to one of our questions, frankly acknowledged that the day-to-day operations of government would not be impacted negatively if we were to conclude that the Tax Court was a "Court of Law." This concession alone, however, cannot lead us to ignore the Constitution and the existing precedent. While the issue before us is not susceptible to easy analysis, we are convinced that our holding is consistent with the nation's constitutional framework and the practical considerations of managing the operations of our contemporary government.

CONCLUSION

Our review of the language and legislative history of section 7443A of Title 26 leads us to conclude that Congress, when it used the phrase "any other proceeding," intended to authorize the assignment of complex tax cases that involve large amounts in controversy to special trial judges. We also hold that the Tax Court is a "department" with the Chief Judge as its "head" within the meaning of the Appointments Clause. In reaching this latter result, we have sought to balance the competing values of remaining loyal to the Constitution's framework and the pragmatic concerns of effectively governing

this nation. In sum, we hold that section 7443A is not constitutionally infirm. Our opinion should not be read to cast a shadow on the constitutional legitimacy of Article I courts. The constitutionality of such forums is undoubted. Rather, our decision stands for the limited proposition that the Tax Court is not a "Court of Law" within the meaning of the Appointments Clause, but is instead a department associated with the executive branch. Accordingly, we affirm the decision of the Tax Court, but on a different rationale.

FOOTNOTES

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[1] Appearing as *amicus curiae,* Erwin N. Griswold, former Solicitor General, submits that the Tax Court's decision should be affirmed in all respects.

[2] This is a rule of statutory construction that provides that when general words follow the enumeration of particular classes, the general words should be construed as applying only to things of the same general class as those enumerated. Blacks Law Dictionary 517 (6th ed. 1990).

[3] To implement this statutory provision, the Tax Court, pursuant to the authority conferred by 26 U.S.C. § 7453, promulgated Rule 183 of the Tax Court Rules of Practice and Procedure. Rule 183 further defines the respective functions of the special trial judges and the Tax Court in cases where the amount in dispute exceeds $10,000. After conducting the trial and after the submission of any briefs, the special trial judge must submit a report, including his findings of fact and conclusions of law, to the chief judge, who in turn assigns the case to a Division of the Tax Court. Rule 183(b). Rule 183(c) addresses the duties and authority of the Tax Court Division:

> The Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or reject it in whole or in part, or may direct the

> filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

[4] The provisions that parallel those currently found in section 7443A(b)(1)-(3) were previously codified at section 7456(d)(1)-(3).

[5] We note that the *Freytag* Court addressed the waiver issue in a footnote, but did not examine any of the applicable law. 904 F.2d at 1015 n.9.

[6] As we discuss *infra*, any attempt by Congress to impose such a condition would be inconsistent with the overriding imperatives of the Appointments Clause. *Cf. Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (state cannot impose unconstitutional conditions on the availability of state created rights).

[7] 26 U.S.C. § 7443A(a) provides:

> The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

[8] The company's arguments implicitly recognize the existence of a "fourth branch" within our constitutional framework. *See generally* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

[9] We note that in making this argument the Solicitor General, who is arguing on behalf of the Commissioner, abandoned the position that he advanced before the Tax Court below. Previously, it had been argued that the Tax Court was a "Court of Law." The Solicitor General now submits that he changed his legal arguments after further study of the issue.

[10] The task of navigating through the murky waters that surround this area of constitutional law is a difficult one. As

the Supreme Court has recognized, a concise and direct analysis of the issues surrounding the distinctions between Article III and Article I courts is extremely difficult because this area of constitutional law is plagued by "frequently arcane distinctions and confusing precedents." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, *J.*, concurring).

[11] Although Congress plainly has the authority under Article I to create legislative courts, such as the Tax Court, it is equally clear that such courts lack the requisites of Article III status. The cases which have recognized the legitimacy of legislative courts have been careful to distinguish such courts from "constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *see also Ex Parte Bakelite Corp.*, 279 U.S. 438, 449-50 (1929); *Crowell v. Benson*, 285 U.S. 22, 50 (1932). The Court's recent reluctance to make any definitive statements regarding the jurisdictional tension between Article III and Article I courts does not undermine the fundamental proposition that Article I and Article III courts stand on a different constitutional footing. *See Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 585-87 (1985); *see generally* Note, *Formalism and Functionalism: From Northern Pipeline to Thomas v. Union Carbide Agricultural Products Co.*, 37 Syracuse L. Rev. 1003 (1986).

APPENDIX B

United States Tax Court.

FIRST WESTERN GOVERNMENT SECURITIES, INC., ET AL.,[1]
PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 25760-84, 32276-84, 33758-84, 22524-85, 6400-86, 21748-85, 25978-86, 2786-87.

Filed April 9, 1990.

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[1] For purposes of these motions, cases of the following petitioners are consolidated herewith: Sidney P. Samuels, docket No. 32276-84; Samuels, Kramer and Company, docket No. 33758-84; Sidney P. Samuels and Laurel M. Samuels, docket No. 22524-85; First Western Investments, Inc. and Subsidiaries, docket No. 6400-86; Samuels, Kramer and Company, docket No. 21748-86; Sidney P. Samuels and Laurel M. Samuels, docket No. 25978-86; First Western Investments, Inc. and Subsidiaries, docket No. 2786-87.

OPINION

NIMS, *Chief Judge*: These cases are before the Court on petitioners' motions to vacate the assignment of their cases to a special trial judge and to request that a Presidentially appointed Tax Court judge be assigned to consider these cases. By these motions, petitioners challenge the procedures which have been utilized by this Court for over 50 years. *See Appendix A.*

Respondent determined deficiencies in and additions to petitioners' Federal income taxes as follows:

Docket No.	Taxable Year	Deficiency	Additions to Tax – Sections 6653(b)	6653 (b)(1)	6653 (b)(2)	6661	6621 (c)
25760-84	1978	$ 6,042,502	$ 3,021,251	$ –	–	$ –	–
	1979	10,229,372	5,114,686	–	–	–	–
	1980	30,420,098	15,210,049	–	–	–	–
32276-84	1980	412,164	206,082	–	–	–	–
33758-84	1978	169,464	–	–	–	–	–
	1979	1,136,581	568,291	–	–	–	–
	1980	67,655	–	–	–	–	–
22524-85	1981	14,225,894	7,112,947	–	–	–	(2)
6400-86	1981	36,004,857	–	18,002,429	(1)	–	(2)
21748-86	1981	20,300	–	10,150	(1)	–	(2)
25978-86	1982	156,996	–	78,498	(1)	13,586	(2)
2786-87	1982	24,510,631	–	12,255,316	(1)	6,127,658	(2)

(1) 50% of the interest
(2) Interest will accrue at 120% of the normal rate

Unless otherwise indicated, all references to the Constitution are to the United States Constitution, all section references are to the Internal Revenue Code (Title 26 of the United States Code), and all Rule references are to the Tax Court Rules of Practice and Procedure.

At the time of filing their petitions, petitioners First Western Government Securities, Inc., First Western Investments, Inc. and Subsidiaries, and Samuels, Kramer and Company had their principal places of business in San Francisco, California, Reno, Nevada and New York, New York, respectively.

At the time of filing of their petitions, petitioners Sidney P. and Laurel M. Samuels were residents of San Francisco, California.

Petitioners' cases raise issues similar to those raised in over 3,000 cases that have been filed in this Court. The common denominator of these cases is that each petitioner other than First Western Government Securities, Inc. (First Western) allegedly entered into financial transactions involving forward contracts for Government mortgage-backed securities with petitioner First Western.

From among the 3,000 above-mentioned cases, 12 cases (not including the cases now before us) were selected as test cases and were initially assigned by the chief judge of this Court to Judge Richard C. Wilbur. Subsequently, following Judge Wilbur's disability retirement on April 30, 1086 [sic], the cases were reassigned without objection pursuant to section 7456(d) (redesignated as section 7443A(b) by the Tax Reform Act of 1986, Pub. L. 99-514, section 1556, 100 Stat. 2755; see Appendix

A) and Rule 180, to Special Trial Judge Carleton D. Powell. In due course the cases proceeded to trial and Opinion. The trial was held in San Francisco, California, and Washington, D.C., and consumed all or part of 16 weeks of trial time. Approximately 7,000 exhibits were received into evidence. On October 21, 1987, the Court agreed with and adopted the Opinion of Special Trial Judge Powell, reported as *Freytag v. Commissioner*, 89 T.C. 849 (1987). Rule 183(c); see Appendix B.

Pursuant to section 7443A and Rules 180, 181 and 183, petitioners' cases, which are part of the above-mentioned 3,000 case group, were also assigned to Special Trial Judge Powell. On October 12, 1989, petitioners filed identical motions to vacate the assignment of their cases to Special Trial Judge Powell. On January 16, 1990, respondent filed objections to the motions to vacate and memorandums of points and authorities in support of his objections. On February 15, 1990, petitioners filed reply memorandums to respondent's objections.

These cases have been consolidated solely for purposes of considering the motions to vacate.

The Tax Court was created by Congress under article I of the Constitution and is composed of 19 judges who are appointed by the President, by and with the advice and consent of the Senate. Section 7441 and 7443(a) and (b). At least biennially, the judges of the Tax Court designate one judge to be chief judge. Section 7444(b). The chief judge may appoint special trial judges. Section 7443A(a). Special Trial Judge Powell is one of 14 current special trial judges appointed by the chief judge.

The Court takes judicial notice that as of February 28, 1990, there were 54,428 cases pending in this Court. Of this number, 37,405 cases have been identified as having tax shelter issues. Of this number, 168 groups of related cases identified as involving tax shelter issues have been assigned under section 7443A(b)(4) to Special Trial Judges. These groups encompass approximately 14,500 cases.

Petitioners object to the assignment of these cases to Special Trial Judge Powell on the grounds that (1) section 7443A does not authorize the chief judge of the Tax Court to assign these cases to a special trial judge; and (2) the Appointments Clause of the United States Constitution article II, section 2, clause 2 does not permit Congress to authorize the chief judge of the Tax Court to appoint special trial judges.

In recognition of the well-established judicial preference of avoiding a constitution ruling if an independent statutory basis for a decision is available, we will first consider whether section 7443A authorizes the chief judge of the Tax Court to assign these cases to a special trial judge.

Petitioners contend that the assignment by the chief judge of these cases to a special trial judge exceeds the authority conferred on the chief judge by section 7443A (see Appendix A) because the amount in dispute in each case exceeds $10,000.

Section 7443A(b) authorizes the chief judge to assign the following proceedings to special trial judges.

> (b) PROCEEDINGS WHICH MAY BE ASSIGNED TO SPECIAL TRIAL JUDGES. – The chief judge may assign –
>
> (1) any declaratory judgment proceeding,
>
> (2) any proceeding under section 7463 [see Appendix C],
>
> (3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and
>
> (4) any other proceeding which the chief judge may designate,
>
> to be heard by the special trial judge of the court.

Petitioners conceded that paragraph (4), when read in isolation, allows the chief judge to assign any proceeding, including the present cases, to a special trial judge. However, petitioners assert that the language "any other proceeding" in paragraph (4) is actually limited to the type of proceedings described in paragraphs (1), (2) and (3) when paragraph (4) is read in conjunction with the other provisions of section 7443A(b). Petitioners contend that unless assignments under paragraph (4) are limited, paragraphs (1), (2) and (3) serve no purpose.

Respondent contends that paragraph (4) was added to section 7443A to allow the chief judge to assign proceedings distinct from those described in paragraphs (1), (2) and (3) to special trial judges. We agree with respondent.

Petitioners rely on *Gomez v. United States*, ___ U.S. ___, 109 S.Ct. 2237 (1989), to support their contention that proceedings that may be assigned under paragraph (4) are limited to the proceedings described in paragraphs (1), (2) and (3). *Gomez* addressed the issue of whether the Federal Magistrates Act (the Act) authorized United States district courts to assign jury selection in felony trials to magistrates. The Supreme Court determined that Congress did not intend to allow district courts to assign the duty of selecting juries in felony trials to magistrates under a clause in the Act allowing "additional duties" not otherwise prohibited to be assigned.

In *Gomez*, the Supreme Court analyzed the legislative history and structure of the Act and concluded that Congress did not intend to permit jury selection in a felony trial to be assigned to magistrates under the additional duties clause. Specifically, the Supreme Court stated:

> By a literal reading this additional duties clause would permit magistrates to conduct felony trials. But the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial. The legislative history, with its repeated statements that magistrates should handle subsidiary matters to enable district judges to concentrate on trying cases, and its assurances that magistrates' adjudicatory jurisdiction had been circumscribed in the interests of policy as well as constitutional constraints, confirms this inference. Similar considerations lead us to conclude that Congress also did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties.

[*Gomez v. United States*, ___ U.S. ___, 109 S.Ct. 2237, 2245-2246 (1989); fn. refs. omitted.]

In contrast, the legislative history and structure of section 7443A(b) show that Congress added paragraph (4) to allow the chief judge to assign proceedings not described in paragraphs (1), (2) and (3) to special trial judges. Thus, applying the Supreme Court's analysis in *Gomez* to section 7443A(b) shows that paragraph (4) authorizes the chief judge to assign the present cases to a special trial judge.

Paragraph (4) was added to present section 7443A(b) in 1984. Prior to 1984, the chief judge was authorized to assign to special trial judges only "any declaratory judgment proceedings, any small tax case, and any other proceeding where the amount in dispute [did] not exceed $5,000." H. Rept. No. 98-432 at 1568 (March 5, 1984). These are the proceedings currently found in paragraphs (1), (2) and (3) (with the dollar ceiling raised to $10,000).

The Supplemental Report of the Committee on Ways and Means, H. Rept. No. 98-432 at 1568 (March 5, 1984), states the reasons for adding paragraphs (4) and the explanation of the change as follows:

Reasons for Change

> The committee wishes to clarify that additional proceedings may be assigned to [Special Trial Judges] so long as a Tax Court judge must enter the decision.

Explanation of Provision

> A technical change is made to allow the Chief Judge of the Tax Court to assign any proceeding to a special trial judge for hearing and

> to write proposed opinion, subject to review and final decision by a Tax Court judge, regardless of the amount in issue. However, special trial judges will not be authorized to enter decision in this latter category of cases.

Because the legislative history and structure of section 7443A show that Congress intended to allow the chief judge to assign any proceeding to a special trial judge, provided that a Tax Court judge review the opinion and enter the decision, petitioners' reliance on *Gomez* is misplaced.

It is important to note that at the same time paragraph (4) was added to the present section 7443A(b) Congress also amended present section 7443A(c) to provide that a special trial judge could only enter decisions in proceedings assigned under paragraph (1), (2) and (3).

Section 7443A(c) provides:

> (c) AUTHORITY TO MAKE COURT DECISIONS. – The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

Before 1984, the present section 7443A permitted special trial judges to enter decisions in any proceedings assigned to them. However, after Congress amended present section 7443A(c), special trial judges were limited to entering decisions in the proceedings described only in subsection (b)(1), (2) and (3).

An assignment made under subsection (b)(1), (2) or (3) differs from an assignment made under subsection

(b)(4) because a special trial judge may enter the decision of the Court in an assignment made under the former but not the latter. Furthermore, reports in cases assigned under subsection (b)(4) must be reviewed and adopted by a Presidentially appointed judge of the Court. Rule 183(c); see Appendix B. In addition, where appropriate the chief judge may direct that such report be reviewed by the entire Tax Court. Section 7460(b). Thus, petitioners' contention that subsection (b)(4) subsumes subsection (b)(1), (2) and (3) is erroneous.

Accordingly, we conclude that section 7443A(b)(4) authorizes the chief judge to assign the present cases to a special trial judge.

Appointments Clause

We next consider petitioners' contention that section 7443A(a) authorizing the chief judge of the Tax Court to appoint special trial judges is unconstitutional.

Section 7443A(a) provides:

> (a) APPOINTMENT. – The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

Petitioners assert that article II, section 2, clause 2 of the Constitution (the Appointments Clause) precludes Congress from vesting the authority to appoint special trial judges in the chief judge of the Tax Court.

The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall

> appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Officers of the United States

Petitioners first contend that special trial judges are principal officers of the United States who, under the Appointments Clause, may only be appointed by the President by and with the advice and consent of the Senate. Respondent argues that special trial judges are not principal or inferior officers of the United States, but employees of the Tax Court. Thus, respondent contends that the Appointments Clause does not in any way limit Congress' power to authorize the chief judge of the Tax Court to appoint special trial judges.

The Appointments Clause is not a discretionary provision but applies to the appointment of "all persons who can be said to hold an office under the government * * *." *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (quoting *United States v. Germaine*, 99 U.S. 508, 509-510 (1879). However, not all employees of the government are officers of the United States. Persons who simply assist officers in discharging their duties are "lesser functionaries subordinate to officers of the United States." *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, 99 U.S. 508 (1879).

In contrast, an officer is an "appointee exercising significant authority pursuant to the laws of the United States * * * ." *Buckley v. Valeo, supra* at 126. Whether an individual is an officer rather than an employee "is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto." *Burnap v. United States,* 252 U.S. 512, 516 (1920).

The position of special trial judge was created by Congress through an amendment to the Internal Revenue Code. Section 958 of the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, 734. Special trial judges may be assigned any proceeding and may enter the decision of the Court in any declaratory judgment proceeding, any small tax case or any case in which the amount in dispute does not exceed $10,000. Section 7443A(b) and (c). Special trial judges are appointed for an indeterminate period, may be dismissed without restriction and receive 90 percent of the compensation of Presidentially appointed Tax Court judges. Section 7443A(a) and (d)(1); see *Ex parte Hennen,* 13 Peters 230, 258-259 (1839).

Because special trial judges may be assigned any case and may enter decisions in certain cases, it follows that special trial judges exercise significant authority. Thus, special trial judges are officers, not employees of the United States.

Principal and Inferior Officers

Petitioners assert that special trial judges are "principal" officers who must be appointed by the President by

and with the advice and consent of the Senate. Respondent contends that the special trial judges are "inferior" officers. We agree with respondent.

"The Constitution for purposes of appointment * * * divides all its officers into two classes." *United States v. Germaine, supra* at 509. "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo, supra* at 132.

The line between inferior and principal officers is one that is far from clear, and the Framers of the Constitution provided little guidance as to where it should be drawn. *Morrison v. Olson,* 487 U.S. 654, ___, 108 S.Ct. 2597, 2608 (1988). In determining whether a person is a principal or inferior officer, the Supreme Court has considered whether (1) a principal officer has the power to remove the officer; (2) the duties delegated are subject to limitations; (3) the jurisdiction of the office is limited; and (4) the appointment is temporary or permanent. *Morrison v. Olson,* 108 S.Ct. at 2608-2609.

The chief judge of the Tax Court, a principal officer, has the authority to appoint and remove special trial judges without restriction. Section 7443A(a); see *Ex parte Hennen, supra* at 258-259. The duties of special trial judges are defined and limited by the Order issued by the chief judge assigning a case to a special trial judge. Rules 180, 181, 182 and 183. Special trial judges may only enter the decision of the Court in declaratory judgment proceedings, small tax cases and cases in which the amount in

dispute does not exceed $10,000, and in no others. Section 7443A(c).

Commissioners and magistrates serving other courts are considered to be inferior officers. *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 352 (1931); *Rice v. Ames,* 180 U.S. 371, 378 (1901); *Pacemaker Diagnostic Clinic of America v. Instromedix,* 725 F.2d 537, 545 (9th Cir. 1984). We conclude that the duties and authority of special trial judges are similar to those of commissioners or magistrates.

The commissioners and magistrates in the above cases had more authority and greater protection from removal than special trial judges. Commissioners were empowered to issue arrest warrants, search warrants, and to arrest and imprison. *Go-Bart Importing Co. v. United States, supra* at 156. Magistrates may preside in any civil or misdemeanor trial with the consent of the parties. 28 U.S.C. section 636(c) (1982); 18 U.S.C. section 3401(b) (1982). Magistrates are appointed for a term of years and can only be removed for cause while special trial judges are appointed for an indeterminate period and their employment may be terminated without cause, e.g., lack of work for them to perform, budgetary limitations, and the like. 28 U.S.C. section 631 (1982); see *Ex parte Hennen, supra* at 258-259.

Considering the limitations placed on the duties, jurisdiction and tenure of special trial judges, we conclude that special trial judges are inferior, not principal, officers of the United States.

Courts of Law

Petitioners assert that the Appointments Clause does not allow Congress to vest the authority to appoint inferior officers such as special trial judges in the chief judge of the Tax Court.

In *United States v. Germaine, supra,* at 509-510, the Supreme Court stated that:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. * * *

Petitioners concede that Congress may vest the power to appoint inferior officers in the courts of law. However, petitioners assert that the term "Courts of Law" refers only to courts created under article III of the Constitution. Thus, petitioners contend that because the Tax Court was created under article I of the Constitution, Congress may not vest the authority to appoint inferior officers in the chief judge of the Tax Court.

Respondent contends that the term "Courts of Law" refers to Article I as well as Article III courts, and therefore, Congress may vest the authority to appoint inferior officers in the chief judge of the Tax Court.

It is well established that the term "Courts of Law" includes Article III courts. *Morrison v. Olson*, 108 S.Ct. at 2609-2611; *Go-Bart Importing Co. v. United States*, *supra* at 156-157; *Rice v. Ames*, *supra* at 378.

The parties, however, do not cite a case addressing the issue of whether an Article I court is a court of law within the meaning of the Appointments Clause. The Court's own research has not revealed such a case. Therefore, the issue of whether an Article I court is a court of law, under the Appointments Clause, is one of first impression.

The Tax Court is a court of record established under article I of the Constitution. Section 7441. A "court of record" is generally defined as "a court that is required to keep a record of its proceedings, and that may fine or imprison." See Black's Law Dictionary, p. 319 (5th ed. 1979). We find nothing in the definition of a court of record to preclude a court such as the Tax Court from being a court of law as well.

Black's Law Dictionary, *supra* at 323, defines a court of law as follows:

> In a wide sense, any duly constituted tribunal administering the laws of the state or nation; in a narrower sense, a court proceeding according to the course of the common law and governed by its rules and principles, as contrasted with a "court of equity."

The Tax Court fits within the wide definition of the term "court of law" because it is a duly constituted tribunal administering laws of the United States.

The narrower definition of the term "court of law" implies that a court must have common law as contrasted with equitable powers to be a court of law. Whether an Article I court generally may exercise common law powers is unclear. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59-60 (1982); cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-858 (1986).

Petitioners assert that the language of the Appointments Clause shows that the term "Courts of Law" refers to Article III courts. Thus, the commonly accepted definition of the term "court of law" is not the relevant definition.

The portion of the Appointments Clause permitting Congress to delegate the appointment of inferior officers (the delegation clause) provides:

> but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Petitioners contend that using the term "Heads of Departments" in conjunction with "Courts of Law" implies that the Clause refers to the executive and judicial branches of government. See *Buckley v. Valeo, supra* at 127. Accordingly, petitioners assert that the term "Courts of Law" refers only to Article III, not Article I, courts.

The delegation clause was proposed and adopted with no debate as to the meaning of the terms "Courts of Law" or "Heads of Departments." M. Farrand, 2 Records of the Federal Convention of 1787, pp. 627-628 (1966) (see Appendix D, *infra*); see also *Morrison v. Olson*, 108 S.Ct. at

2610. Thus, whether the term "Courts of Law" was intended for some reason to refer exclusively to Article III courts cannot be determined by examining the history of the delegation clause.

In *Ex parte Hennen, supra* at 257, the Supreme Court considered the term "Courts of Law" as used in the delegation clause and stated:

> The appointing power here designated, in the latter part of the section, was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the constitution cannot be questioned. * * *

The Supreme Court read the delegation power as "intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." Thus, the Supreme Court considered that the purpose of the delegation clause was to allow Congress to vest the authority to appoint where it "most appropriately belonged."

In *Ex parte Siebold*, 100 U.S. 371, 397 (1880), the Supreme Court expanded the meaning of the delegation clause by stating:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution * * * .

The Court read the delegation clause as permitting Congress to vest the appointment power either in the particular department to which the duties of the officer pertain or in any other department of government. Thus, it is within the discretion of Congress to decide where the appointing power should be placed. *Morrison v. Olson*, 108 S.Ct. at 2610-2611.

Congress vested the authority to appoint special trial judges in the chief judge of the Tax Court. The delegation clause was intended to allow Congress to vest the authority to appoint inferior officers in the Court to which the officer to be appointed most appropriately belonged. Thus, reading the term "Courts of Law" to exclude the Tax Court would frustrate the purpose for which the delegation clause was created.

Nothing in the cases which have interpreted the delegation clause suggests that the clause was intended to deprive Congress of the power to vest the appointment power in a lawfully created governmental body should that body not fit within the terms "Heads of Departments" or "Courts of Law" as those terms were defined when the Constitution was adopted. To the contrary, the Supreme Court has read the delegation clause as giving Congress broad discretion in vesting the appointment power where Congress deems appropriate.

Congress long authorized the former Court of Claims, when an Article I court, to appoint its own commissioners and clerk. See W. Cowen, The United States Court of Claims – A History, 216 Ct.Cl. 1, 90-95, 177 (1978). Congress permits administrative agencies to

appoint their own administrative law judges who perform duties similar to those of special trial judges. 5 U.S.C. section 3105 (1982).

Petitioners suggest that because administrative agencies do not come within the term "Heads of Departments," Congress may not vest the authority to appoint inferior officers in agencies either. However, the Supreme Court has upheld the authority of administrative agencies to delegate their adjudicatory functions including their fact-finding role, to administrative law judges. *Morgan v. United States,* 298 U.S. 468, 481 (1936).

Until 1969, the Tax Court was an independent agency in the executive branch. See *Martin v. Commissioner,* 358 F.2d 63, 64 (7th Cir. 1966). While an independent executive agency, the Tax Court would have been able to appoint its own special trial judges. See *Morgan v. United States, supra* at 481.

In 1969, the Tax Court was established by Congress as an Article I court. Section 7441. Petitioners, in effect, contend that by elevating the Tax Court to an Article I court Congress rendered itself powerless to authorize the Court to appoint its own special trial judges or even its own clerk. See *Ex parte Hennen, supra.* We find this conclusion untenable.

Legislative Officer

Petitioners further contend that because the Tax Court's authority is derived from Article I, the chief judge of the Tax Court is a legislative officer and that legislative officers are not permitted to appoint inferior officers

under the Appointments Clause. See *Buckley v. Valeo, supra* at 127. We do not agree.

While the Tax Court's powers as an Article I court are not derived from Article III, those powers are nonetheless judicial. *Anthony v. Commissioner*, 66 T.C. 367, 369 (1976). The powers exercised by an officer, not the source of those powers, determine whether an officer is a legislative, executive or judicial officer under the Appointments Clause. *Buckley v. Valeo, supra* at 140-141. The Supreme Court held in *Williams v. United States*, 289 U.S. 553, 566-567 (1933), that Article I courts exercise judicial power. The Court stated that:

> The validity of this view is borne out by the fact that the appellate jurisdiction [or the Supreme Court's jurisdiction] over judgments and decrees of the legislative courts has been upheld and freely exercised under the acts of Congress from a very early period, a practice which can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power – as distinguished from legislative, executive, or administrative power – although not conferred in virtue of the third article of the Constitution.
>
> * * *
>
> If the power exercised by legislative courts is not judicial power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof.

Because the powers exercised by the Tax Court are judicial powers, not legislative powers, Tax Court judges are judicial officers, not legislative officers. As judicial officers of the United States, Tax Court judges must be appointed by the President by and with the advice and

consent of the Senate in accordance with the Appointments Clause. Section 7433(b).

Accordingly, petitioners' contention that the chief judge of the Tax Court is a legislative officer and thus cannot appoint inferior officers such as special trial judges is erroneous.

Chief Judge's Authority

Petitioners next contend that because the term "Courts of Law" in the delegation clause is in the plural form, Congress is required to vest the authority to appoint special trial judges in more than one judge of the Tax Court. We do not agree.

The terms "Courts of Law" and "Heads of Departments" in the delegation clause refer to the courts and departments which Congress is authorized to create. The term "Courts of Law" in no way implies that Congress must vest the authority to appoint special trial judges in more than one judge. Thus, we hold that Congress has properly vested the authority to appoint special trial judges in the chief judge of the Tax Court.

Accordingly, petitioners' motions to vacate will be denied.

* * *

Petitioners have requested that if their motions are denied the Court, pursuant to Rule 193 and section 7482(a)(2), include a statement in its Order that there is controlling question of law involved as to which there is a substantial ground for a difference of opinion and that an immediate appeal from the Order may materially

advance the ultimate termination of the litigation. The Court's interlocutory Order, a copy of which is attached hereto as Appendix E, contains such a statement.

We point out that, while such a statement has been included to comply with the statutory requirement, the views of this Court are unanimous. Resolution of this issue, however, is of critical importance not only for this case but also for the functioning of the Court generally. Accordingly, we have taken the unusual step of certifying this issue for interlocutory appeal in order to obtain expeditious resolution of whatever difference of opinion there might be.

An appropriate order will be entered.

Reviewed by the Court.

CHABOT, PARKER, KORNER, SHIELDS, HAMBLEN, COHEN, CLAPP, SWIFT, JACOBS, WRIGHT, PARR, WELLS, WHALEN, and COLVIN, JJ., agree with this opinion.

GERBER and RUWE, JJ., did not participate in the consideration of this opinion.

TAX COURT APPENDIX A

Authority to use special trial assistants originated in section 1114 of the Internal Revenue Code of 1939, as amended by section 503 of the Revenue Act of 1943, Pub. L. 78-235, 58 Stat. 21, 72, when the Board of Tax Appeals existed only as an executive agency. At that time, Congress permitted the presiding judge "from time to time by written order [to] designate an attorney from the legal staff of the court to act as a commissioner in a particular

case. * * * [to] proceed under such rules and regulations as may be promulgated by the [Tax] court." H. Rept. No. 871, 78th Cong., 1st Sess. (1943), 1944 C.B. 901, 954.

That provision was continued without substantial change as section 7456(c) of the 1954 Code. In 1969, when the status of the Tax Court was changed from that of an independent agency of the Executive Branch to that of an Article I court, this provision was amended to delete the reference to attorneys from the Tax Court's legal staff and to provide for appointment of full-time commissioners for indefinite terms. Section 7456(c) was amended by section 958 of the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, 734, 1969-3 C.B. 161. In addition, section 957 of the same Act provided for the creation of a streamlined procedure for disputes involving $1,000 or less at the option of the taxpayer (and concurred in by the Tax Court), an amount increased to $1,500 in 1972. (Pub. L. 92-512, section 203(b)(2), 86 Stat. 1972-2 C.B. 700).

In 1978, Congress increased the jurisdictional amount to $5,000, again amending section 7456(c) to allow the Tax Court to authorize commissioners to enter decisions in declaratory judgment proceedings, and added section 7463(g), providing the same authority in the case of small tax proceedings. Revenue Act of 1978, Pub. L. 95-600, sections 336(b)(1), 502(a)(1) and (b), 92 Stat. 2841, 2879, 1978-3 C.B. (Volume 1) 75-76, 113. The provisions allowing entry of decisions by commissioners were eventually consolidated in section 7456(d) and expanded in 1982 to encompass all three categories of cases now set forth in section 7443A(b)(1)-(3). Section 7456(d) of the

Code was amended by section 106(c)(1) of the Miscellaneous Revenue Act of 1982, Pub. L. 97-362, 96 Stat. 1726, 1730.

The provisions took essentially their present form in 1984 when the term "commissioner" was formally changed to "special trial judge" and a provision corresponding to present section 7443A(b)(4) was added by sections 463(a) and 464(b) of the Tax Reform Act of 1984, Pub. L. 98-369, 98 Stat. 494, 824. In 1986, the provisions of former section 7456(c) and (d) were moved to new section 7443A by section 1556(a) of Pub. L. 99-514, 100 Stat. 2085, 2754-2755.

TAX COURT APPENDIX B

RULE 183. CASES INVOLVING MORE THAN $10,000

Except in cases subject to the provisions of Rule 182 [cases involving $10,000 or more] or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs: A Special Trial Judge shall conduct the trial of any such case assigned to him for such purpose. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall submit his report, including his findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Division of the Court.

(c) Action on the Report: The Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs, or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

TAX COURT APPENDIX C

SEC. 7463. DISPUTES INVOLVING $10,000 OR LESS.

(a) IN GENERAL. – In the case of any petition filed with the Tax Court for a redetermination of a deficiency where neither the amount of the deficiency placed in dispute, nor the amount of any claimed overpayment, exceeds –

(1) $10,000 for any one taxable year, in the case of the taxes imposed by subtitle A,

(2) $10,000, in the case of the tax imposed by chapter 11,

(3) $10,000 for any one calendar year, in the case of the tax imposed by chapter 12, or

(4) $10,000 for any 1 taxable period (or, if there is no taxable period, taxable event) in the case of any tax imposed by subtitle D which is described in section 6212(a) (relating to a notice of deficiency),

at the option of the taxpayer concurred in by the Tax Court or a division thereof before the hearing of the case, proceedings in the case shall be conducted under this

section. Notwithstanding the provisions of section 7453, such proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe. A decision, together with a brief summary of the reasons therefor, in any such case shall satisfy the requirements of sections 7459(b) and 7460.

(b) FINALITY OF DECISIONS. – A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court and shall not be treated as a precedent for any other case.

(c) LIMITATION OF JURISDICTION. – In any case in which the proceedings are conducted under this section, not-withstanding the provisions of sections 6214(a) and 6512(b), no decision shall be entered redetermining the amount of a deficiency, or determining an overpayment, except with respect to amounts placed in dispute within the limits described in subsection (a) and with respect to amounts conceded by the parties.

(d) DISCONTINUANCE OF PROCEEDINGS. – At any time before a decision entered in a case in which the proceedings are conducted under this section becomes final, the taxpayer or the Secretary may request that further proceedings under this section in such case be discontinued. The Tax Court, or the division thereof hearing such case, may, if it finds that (1) there are reasonable grounds for believing that the amount of the deficiency placed in dispute, or the amount of an overpayment, exceeds the applicable jurisdictional amount described in subsection (a) and (2) the amount of such excess is large

enough to justify granting such request, discontinue further proceedings in such case under this section. Upon any such discontinuance, proceedings in such case shall be conducted in the same manner as cases to which the provisions of section 6214(a) and 6512(b) apply.

(e) AMOUNT OF DEFICIENCY IN DISPUTE. – For purposes of this section, the amount of any deficiency placed in disputed includes additions to the tax, additional amounts, and penalties imposed by chapter 68, to the extent that the procedures described in subchapter B of chapter 63 apply.

(f) QUALIFIED STATE INDIVIDUAL INCOME TAXES. – For purposes of this section, a deficiency placed in dispute or claimed overpayment with regard to a qualified State individual income tax to which subchapter E of chapter 64 applies, for a taxable year, shall be treated as a portion of a deficiency placed in dispute or claimed overpayment of the income tax for that taxable year.

TAX COURT APPENDIX D

M. Farrand, 2 Records of the Federal Convention of 1787, pp. 627-628 (1966)

> Art II. sect. 2. (paragraph 2) To the end of this, Mr Governr. Morris moved to annex "but the Congress may be law vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." Mr. Sherman 2ded. the motion
>
> Mr. Madison. It does not go far enough if it be necessary at all – Superior Officers below

Heads of Departments ought in some cases to have the appointment of the lesser offices.

Mr Govr Morris. There is no necessity. Blank Commissioners can be sent –

On the motion

N.H. ay. Mas – no – Ct ay. N.J. ay. Pa. ay. Del. no. Md. divd. Va no. N.C. ay – S C no. Geo – no – [Ayes – 5; noes – 5; divided – 1.]

The motion being lost by the equal division (of votes,) It was urged that it be put a second time, some such provision being too necessary, to be omitted, and on a second question it was agreed to nem. con.

TAX COURT APPENDIX E

UNITED STATES TAX COURT
Washington, D.C. 20217

FIRST WESTERN GOVERNMENT SECURITIES INC., ET AL., PETITIONERS, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket Nos. 25760-84, 32276-84, 33758-84, 22524-85, 6400-86, 21748-86, 25978-86, 2786-87

ORDER

On October 12, 1989, petitioners filed motions to vacate the assignment of special trial judge. On January 16, 1990, respondent filed objections to petitioners' motions for the assignment of these cases to a Presidentially appointed Judge of the United States Tax Court and memorandums of points and authorities in support of his objections. On February 15, 1990, petitioners filed replies

to respondent's objections to petitioners' motions to vacate the assignment of special trial judge.

After due consideration of petitioners' above-referenced motions to vacate the assignment of special trial judge, pursuant to I.R.C. section 7482(a)(2) and Rule 193, Tax Court Rules of Practice and Procedure, it is

ORDERED that petitioners' above-referenced motions to vacate the assignment of special trial judge are denied. It is further

ORDERED that these cases are hereby certified for interlocutory appeal to the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Ninth Circuit, in that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation in the above-docketed cases. It is further

ORDERED that all proceedings herein are stayed pending resolution of any interlocutory appeal.

/s/ _____
Arthur L. Nims, III
Chief Judge

Entered: April 9, 1990

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York on the fourteenth day of May, one thousand nine hundred and ninety-one.

SAMUELS, KRAMER & COMPANY,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

DOCKET NUMBER
90-4060
90-4064

FILED
MAY 14 1991

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, Samuels, Kramer & Company.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX D

26 U.S.C. § 7443A. Special trial judges

(a) Appointment. – The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

(b) Proceedings which may be assigned to special trial judges. – The chief judge may assign –

(1) any declaratory judgment proceeding,

(2) any proceeding under section 7463,

(3) any proceeding where neither the amount of the deficiency placed in dispute (withing the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and

(4) any other proceeding which the chief judge may designate, to be heard by the special trial judges of the court.

(c) Authority to make court decision. – The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

(d) Salary. – Each special trial judge shall receive salary –

(1) at a rate equal to 90 percent of the rate for judges of the Tax Court, and

(2) in the same installments as such judges.

(e) Expenses for travel and subsistence. – Subsection (d) of section 7443 shall apply to

special trial judges subject to such rules and regulations as may be promulgated by the Tax Court.

(Added Pub.L. 99-514, Title XV, § 1556(a), Oct. 22, 1986, 100 Stat. 2754.)

APPENDIX E

Tax Court Rules of Practice

Rule 183. Cases Involving More Than $10,000. Except in cases subject to the provisions of Rule 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs: A Special Trial Judge shall conduct the trial of any such case assigned for such purpose. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge or Division of the Court.

(c) Action on the Report: The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

APPENDIX F

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Samuels, Kramer and Company

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 33758-84

FIRST WESTERN GOVT.

ORDER

Pursuant to Rules 180, 181 and 183 of the Tax Court Rules of Practice and Procedure, it is

ORDERED that this case is assigned for trial or other disposition to S.T. Judge Carleton D. Powell.

(Signed) Arthur L. Nims, III
Chief Judge

Dated: Washington, D.C.
August 30, 1989.

Richard Joseph Sideman
Sideman & Bancroft
Suite 860
One Embarcadero Center
San Francisco, CA 94111

APPENDIX G

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: THOMAS FREYTAG, ET AL. Petitioners v. COMMISSIONER OF INTERNAL REVENUE

CASE NO: 90-762

PLACE: Washington, D.C.

DATE: April 23, 1991

PAGES: 1-55

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

* * *

[p. 40] QUESTION: Well, Mr. Roberts, to get back to my question, which you never did answer, suppose it does mean it's reviewed under a clearly erroneous standard. Would that violate the authorizing statute in your view?

MR. ROBERTS: I think it might well, Your Honor.

QUESTION: Okay.

MR. ROBERTS: In the sense that a clearly erroneous standard is closer – the statute requires that the regular

tax court judge in this category of cases make the decision.

QUESTION: Yes.

MR. ROBERTS: And I think under a clearly erroneous standard that may be abdicating too much of his statutory responsibility.

* * *